CLE: Adjudication of Capital Cases in Delaware
Friday, April 11, 2008

State Post-Conviction Issues

Moderator: The Honorable T. Henley Graves
Resident Judge Sussex County
Superior Court of Delaware

Panel: Loren C. Meyers, Esquire
Department of Justice, State of Delaware

Robert B. Dunham, Esquire
Capital Habeas Corpus Unit
Federal Community Defender
Eastern District of Pennsylvania

Bernard J. O'Donnell, Esquire
Office of the Public Defender
State of Delaware

Rule 61 of the Rules of Criminal Procedure for the Superior Court of the State of Delaware

RULES OF CRIMINAL PROCEDURE FOR THE SUPERIOR COURT OF THE STATE OF DELAWARE

I. SCOPE, PURPOSE, AND CONSTRUCTION.

Rule 1. Scope.

These rules govern the procedure in all criminal proceedings in Superior Court and in preliminary or supplementary proceedings in other courts when the judge acts as a committing magistrate for Superior Court.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 2. Purpose and construction.

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

NEW CASES

Transfer from the Court of Common Pleas	$100.00
Appeals from Court of Common Pleas	100.00
Indictment by true bill w/o previous commitment	100.00
New information from attorney general's office	100.00
Appeals from Family Court	100.00
Transfer from Family Court	100.00
Appeals from inferior courts	100.00
Commitments from inferior courts	100.00

GENERAL

Any other costs shall be as provided in Superior Court Civil Rule 77(h) under Miscellaneous Services and Non-Fee Charges.

(b) Bank accounts. The prothonotary of each county shall maintain interest-bearing bank accounts as required by statute or by the court, including but not limited to accounts for bail deposits, fees and costs, restitution payments and fines, and shall disburse accrued interest in accordance with 10 Del. C. § 2324, 11 Del. C. § 4106(d)(3) or other statute or, in the absence thereof, as directed by the court. The prothonotary shall keep an accurate and complete record of the receipts and disbursements of each account.

(Adopted, effective Feb. 12, 1953; amended, effective Jan. 1, 1988; revised, effective Jan. 1, 1992; amended, effective July 1, 1997; July 1, 2001; Feb. 1, 2002.)

Rule 59. Effective date.

These rules take effect on January 1, 1992. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 60. Title.

These rules may be known as the Superior Court Rules of Criminal Procedure and a rule may be cited thus: Super. Ct. Crim. R. __.

(Adopted, effective Feb. 12, 1953; revised, effective Jan. 1, 1992.)

Rule 61. Postconviction remedy.

(a) Scope of rule.

(1) Nature of proceeding. This rule governs the procedure on an application by a person in custody or subject to future custody under a sentence of this court seeking to set aside a judgment of conviction or a sentence of death on the ground that the court lacked jurisdiction or on any other ground that is a sufficient factual and legal basis for a collateral attack upon a criminal conviction or a capital sentence. A proceeding under this rule shall be known as a postconviction proceeding.

(2) Exclusiveness of remedy. The remedy afforded by this rule may not be sought by a petition for a writ of habeas corpus or in any manner other than as provided herein.

(b) Motion for postconviction relief.

(1) Form of motion. An application under this rule shall be made by a motion for postconviction relief. The movant must use the prescribed form which shall be made available without charge by the prothonotary. The motion shall be typewritten or legibly handwritten and shall be signed under penalty of perjury by the movant.

(2) Content of motion. The motion shall specify all the grounds for relief which are available to the movant and of which the movant has or, by the exercise of reasonable diligence, should have knowledge, and shall set forth in summary form the facts supporting each of the grounds thus specified.

(3) Multiple convictions. A motion shall be limited to the assertion of a claim for relief against one judgment of conviction or, if judgments of conviction were entered on more than one offense at the same time because of a plea agreement or joinder of offenses at trial, against multiple judgments entered at the same time. Judgments entered at different times shall not be challenged in one motion but only by separate motions.

(4) Time of filing. A motion may not be filed until the judgment of conviction is final.

(5) Place of filing. A motion shall be filed in the office of the prothonotary in the county in which the judgment of conviction was entered.

(6) Amendment of motion. A motion may be amended as a matter of course at any time before a response is filed or thereafter by leave of court, which shall be freely given when justice so requires.

(c) Duties of prothonotary.

(1) Noncomplying motion. If a motion does not substantially comply with the requirements of subdivision (b) of this rule, the prothonotary shall return it to the movant, if a judge of the court so directs, together with a statement of the reason for its return, and shall retain a copy of the motion and of the statement of the reason for its return.

(2) Entry on docket. Upon receipt of a motion that appears on its face to comply with subdivision (b) of this rule, the prothonotary shall accept the motion and enter it on the docket in the proceeding in which the judgment under attack was entered. If the motion attacks judgments entered in separate criminal action files, the prothonotary shall place copies of the motion in each file and make the appropriate docket entries.

(3) Assignment of number. The prothonotary shall assign each motion for postconviction relief a separate criminal action number, which must appear on all filings in the postconviction proceeding.

(4) Service of motion. The prothonotary shall thereupon deliver or serve a copy of the motion together with a notice of its filing on the attorney general. The filing of the motion shall not require the attorney general to respond to the motion unless ordered by the court.

(d) Preliminary consideration.

(1) Reference to judge. The original motion shall be presented promptly to the judge who accepted a plea of guilty or nolo contendere or presided at trial in the proceedings leading to the judgment under attack. If the appropriate judge is unavailable to consider the motion, it shall be presented to another judge in accordance with the procedure of the court for assignment of its work. The judge shall promptly examine the motion and contents of the files relating to the judgment under attack.

(2) Stay of proceedings. If any part of the record of prior proceedings in the case has been removed in connection with an appeal or federal habeas corpus proceeding, the judge may stay proceedings in this court until it has been returned.

(3) Preparation of transcript. The judge may order the preparation of a transcript of any part of the prior proceedings in the case needed to determine whether the movant may be entitled to relief.

(4) Summary dismissal. If it plainly appears from the motion for postconviction relief and the record of prior proceedings in the case that the movant is not entitled to relief, the judge may enter an order for its summary dismissal and cause the movant to be notified.

(e) Appointment of counsel.

(1) Order of appointment. The court will appoint counsel for an indigent movant only in the exercise of discretion and for good cause shown, but not otherwise. Unless the judge appoints counsel for a limited purpose, it shall be the duty of counsel to assist the movant in presenting any substantial ground for relief available to the movant. Upon entry of a final order in a postconviction proceeding, counsel's continuing duty shall be as provided in Supreme Court Rule 26.

(2) Motion to withdraw. If counsel considers the movant's claim to be so lacking in merit that counsel cannot ethically advocate it, and counsel is not aware of any other substantial ground for relief available to the movant, counsel may move to withdraw. The motion shall explain the factual and legal basis for counsel's opinion and shall give notice that the movant may file a response to the motion within 30 days of service of the motion upon the movant.

(f) State's response.

(1) Order to respond. If the motion is not summarily dismissed, the judge shall order the attorney general to file a response to the motion or to take such other action as the judge deems appropriate. Unless otherwise ordered, the response shall be filed within 30 days of service of the order to respond upon the state.

(2) Content of response. The response shall explain the factual and legal basis for the state's position on each ground for relief alleged in the motion in sufficient detail to enable the court to determine whether an evidentiary hearing is desirable or summary disposition of the motion is appropriate. If the motion contains inaccurate or incomplete information about prior proceedings, the response shall supply the correct information.

(3) Movant's reply. The movant may file a reply to the state's response within 30 days of service of the state's response upon the movant.

(g) Expansion of record.

(1) Direction for expansion. The judge may direct that the record be expanded by the parties by the inclusion of additional materials relevant to the determination of the merits of the motion.

(2) Materials to be added. The expanded record may include, without limitation, letters predating the filing of the motion, documents, exhibits, and contents of the file of an appeal or federal habeas corpus proceeding. If the motion alleges ineffective assistance of counsel, the judge may direct the

lawyer who represented the movant to respond to the allegations. Affidavits may be submitted and considered as a part of the record.

(3) Submission to opponent. In any case in which an expanded record is directed, copies of the letters, documents, exhibits, and affidavits proposed to be included shall be submitted to the opposing party, who shall be afforded an opportunity to admit or deny their correctness.

(4) Authentication. The judge may require the authentication of any material filed under this subdivision.

(h) Evidentiary hearing.

(1) Determination by court. After considering the motion for postconviction relief, the state's response, the movant's reply, if any, the record of prior proceedings in the case, and any added materials, the judge shall determine whether an evidentiary hearing is desirable.

(2) Time for hearing. If an evidentiary hearing is ordered, it shall be conducted as promptly as practicable, having regard for the need of both parties for adequate time for investigation and preparation.

(3) Summary disposition. If it appears that an evidentiary hearing is not desirable, the judge shall make such disposition of the motion as justice dictates.

(i) Bars to relief.

(1) Time limitation. A motion for postconviction relief may not be filed more than one year after the judgment of conviction is final or, if it asserts a retroactively applicable right that is newly recognized after the judgment of conviction is final, more than one year after the right is first recognized by the Supreme Court of Delaware or by the United States Supreme Court.

(2) Repetitive motion. Any ground for relief that was not asserted in a prior postconviction proceeding, as required by subdivision (b)(2) of this rule, is thereafter barred, unless consideration of the claim is warranted in the interest of justice.

(3) Procedural default. Any ground for relief that was not asserted in the proceedings leading to the judgment of conviction, as required by the rules of this court, is thereafter barred, unless the movant shows

(A) Cause for relief from the procedural default and

(B) Prejudice from violation of the movant's rights.

(4) Former adjudication. Any ground for relief that was formerly adjudicated, whether in the proceedings leading to the judgment of conviction, in an appeal, in a postconviction proceeding, or in a federal habeas corpus proceeding, is thereafter barred, unless reconsideration of the claim is warranted in the interest of justice.

(5) Bars inapplicable. The bars to relief in paragraphs (1), (2), and (3) of this subdivision shall not apply to a claim that the court lacked jurisdiction or to a colorable claim that there was a miscarriage of justice because of a constitutional violation that undermined the fundamental legality, reliability, integrity or fairness of the proceedings leading to the judgment of conviction.

(6) Movant's response. If ordered to do so, the movant shall explain on the form prescribed by the court why the motion for postconviction relief should not be dismissed or grounds alleged therein should not be barred.

(j) Reimbursement of expenses. If a motion is denied, the state may move for an order requiring the movant to reimburse the state for costs and expenses paid for the movant from public funds. The judge may grant the motion if the movant's claim is so completely lacking in factual support or legal basis as to be insubstantial or the movant has otherwise abused this rule. The judge may require reimbursement of costs and expenses only to the extent reasonable in light of the movant's present and probable future financial resources.

(k) Time for appeal. The time for appeal from an order entered on a motion for relief under this rule is as provided in Supreme Court Rule 6. Nothing in these rules shall be construed as extending the time for appeal from the original judgment of conviction.

(l) Capital cases.

(1) Scope of subdivision. This subdivision applies when a defendant seeks to set aside a sentence of death. The defendant shall have a right to one postconviction proceeding under this subdivision. The other subdivisions of this rule shall apply except insofar as they are inconsistent with the special provisions of this subdivision.

(2) Waiver of rights. The defendant may waive the right to a postconviction proceeding or to appeal an adverse ruling. The court shall not accept a waiver without addressing the defendant personally in open court and determining that the defendant understands the legal consequences of the waiver.

(3) Status of representation. When the time for seeking certiorari to review the Supreme Court's order affirming a sentence of death expires or, if the defendant seeks certiorari, when the United States Supreme Court issues a mandate or order finally disposing of the case, the court shall promptly schedule a session with the defendant and defense counsel to determine the status of representation. Counsel who represented the defendant at trial or on appeal may not represent the defendant in the postconviction proceeding permitted by this subdivision unless the defendant and counsel request continued representation. The court may not grant the request without addressing the defendant personally in open court and determining that the defendant understands that the request for continued representation constitutes a waiver of the right to claim that counsel's representation at trial or on appeal was ineffective. If the defendant requests the appointment of new counsel, the court shall promptly rule on that request.

(4) Schedule of proceeding. When the status of representation has been determined, the court shall enter an order setting the schedule of the postconviction proceeding within the following time limits. The motion for postconviction relief shall be filed within 60 days of the date of the scheduling order and shall be submitted for decision within 270 days of the date of the scheduling order. The court for compelling cause may grant an enlargement of not more than an additional 60 days for filing or submission or both, provided that a request for enlargement is made before the expiration of the prescribed time period. If enlargement is granted, the court shall state its finding of compelling cause with specificity. The court shall enter a final order within 60 days of the date of submission.

(5) Sanction for delay. Upon a party's failure to comply with the scheduling order, the court shall immediately issue a rule directing the party

to show cause why sanctions should not be imposed for the failure to comply. Unless a defendant shows compelling cause for failing to comply, the court shall enter an order barring the defendant from filing a motion for postconviction relief or dismissing the defendant's motion for postconviction relief with prejudice.

(6) Date of execution. Following the completion of direct review, the court shall not set a date of execution until the defendant has an opportunity for one postconviction proceeding and review by the Supreme Court. If the defendant waives the right to a postconviction proceeding or to appeal, or the Supreme Court dismisses the defendant's appeal or affirms a ruling adverse to the defendant, the court shall promptly set a date for execution no less than 90 days, unless waived, nor more than 120 days from the date that the waiver was accepted or the Supreme Court's mandate issued.

(7) Stay for further proceedings. The court shall not entertain an application to stay an execution date set pursuant to paragraph (6) of this subdivision for the purpose of further postconviction proceedings. An application to stay execution for federal certiorari or habeas corpus proceedings shall be made to the appropriate federal court. An application to stay execution for any other purpose shall be made in accordance with Supreme Court Rule 35(e).

(m) Definition. A judgment of conviction is final for the purpose of this rule as follows:

(1) If the defendant does not file a direct appeal, 30 days after the Superior Court imposes sentence;

(2) If the defendant files a direct appeal or there is an automatic statutory review of a death penalty, when the Supreme Court issues a mandate or order finally determining the case on direct review; or

(3) If the defendant files a petition for certiorari seeking review of the Supreme Court's mandate or order, when the United States Supreme Court issues a mandate or order finally disposing of the case on direct review.

(Added, effective Jan. 1, 1988; revised, effective Jan. 1, 1992; amended, effective Nov. 9, 1993; May 1, 1996; July 1, 2005.)

Rule 62. Commissioners.

(a) Each Commissioner shall have all powers and duties conferred or imposed upon Commissioners by law, by the Rules of Criminal Procedure for the Superior Court, and by Administrative Directive of the President Judge, including, but not limited to:

(1) the power to administer oaths and affirmations, to issue orders pursuant to Chapter 21, Title 11 of the Delaware Code concerning release or detention of persons pending trial and to take acknowledgments, affidavits, and depositions;

(2) the power to accept pleas of not guilty to any offenses within the jurisdiction of the Superior Court and to appoint counsel to represent indigent defendants;

(3) the power to accept a plea of guilty to a misdemeanor or to a violation and, with the consent of the parties, to enter sentence thereon.

(4) Non case-dispositive matters. The power to conduct non case-dispositive hearings, including non case-dispositive evidentiary hearings (excluding motions to suppress evidence in a criminal case) and the power to

DEFENDER ASSOCIATION OF PHILADELPHIA
PENNSYLVANIA CAPITAL REPRESENTATION PROJECT
INDEPENDENCE SQUARE WEST, SUITE 545 WEST, THE CURTIS CENTER
PHILADELPHIA, PA 19106

(215) 928-0520 **(215) 928-0826 (fax)**

CITE LIST OF PENNSYLVANIA DEATH PENALTY REVERSALS BECAUSE OF INEFFECTIVE ASSISTANCE OF COUNSEL

by Robert Brett Dunham
Director of Training

Updated March 6, 2008

I. Failure to Investigate and Present Mitigating Evidence in Penalty Phase

A. State Court Cases

Substantive Reversals

Pennsylvania Supreme Court –
Commonwealth v. Gorby, No. 385 Cap. App. Dkt., 589 Pa. 364, 909 A.2d 775 (Pa. June 20, 2006)
Commonwealth v. Sneed, No. 366 Cap. App. Dkt., 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006)
Commonwealth v. May, No. 415 Cap. App. Dkt., 587 Pa. 184, 898 A.2d 559 (Pa. May 25, 2006)
Commonwealth v. Collins (Ronald), Nos. 372 & 373 CAP, 585 Pa. 45, 888 A.2d 564 (Pa. Dec. 27, 2005)
Commonwealth v. Zook, No. 293 Cap. App. Dkt., 585 Pa. 11, 887 A.2d 1218 (Pa. Nov. 28, 2005)
Commonwealth v. Moore, Nos. 316, 317 Cap. App. Dkt., 580 Pa. 279, 860 A.2d 88 (Pa. Oct. 21, 2004)
Commonwealth v. Malloy, No. 311 Cap. App. Dkt., 579 Pa. 425, 856 A.2d 767 (Pa. Sept. 1, 2004)
Commonwealth v. Ford, 570 Pa. 378, 809 A.2d 325 (Pa. Oct. 24, 2002)
Commonwealth v. Smith (Brian), 544 Pa. 219, 675 A.2d 1221 (May 22, 1996), *cert. denied*, 519 U.S. 1153 (Feb. 27, 1997)
Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705 (July 1, 1994)
Commonwealth v. O'Donnell, 559 Pa. 320, 347 n.3, 740 A.2d 198, 214 n.13 (Pa. Oct. 28, 1999)

Courts of Common Pleas –

Commonwealth v. Rainey, Apr. Term, 1990, Nos. 1967-1972 (Phila. C.P. Mar. 3, 2008) (Philadelphia, PCRA) (stipulated penalty-phase relief)

Commonwealth v. Hanible, April Term, 1999, No. 0902 (Phila. C.P. Jan. 8, 2008) (stipulated penalty-phase relief)

Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007) (stipulated relief for direct appeal counsel's ineffectiveness in failing to investigate and present claim that trial counsel was ineffective in failing to investigate and present available mitigating evidence)

Commonwealth v. Johnson (Raymond), No 3849/99 (Berks C.P., Crim. Div., Mar. 9, 2007)

Commonwealth v. Thomas (LeRoy) a/k/a John Wayne, Dec. Term, 1994, No. 700 (Phila. C.P. Jan. 11, 2007) (stipulated penalty-phase relief)

Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 3, 2006)

Commonwealth v. Lesko, No. 681 C 1980 (Westm. C.P. Aug. 7, 2006)

Commonwealth v. Hutchinson, Apr. Term, 1998, No. 0858 (Phila. C.P., Crim. Div., July 25, 2006) (stipulated penalty-phase relief)

Commonwealth v. Williams (Craig), May Term, 1987, Nos. 2563-2565 (Phila. C.P., Crim. Div., July 11, 2006) (stipulated penalty-phase relief)

Commonwealth v. Sattazahn, No. 2194-89, *slip op.* (Berks C.P., Crim. Div., June 23, 2006)

Commonwealth v. Gibson (Ronald), Jan. Term, 1991, No. 2809 (Phila. C.P. Apr. 26, 2006)

Commonwealth v. McCrae, Feb. Term, 1999, No. 0452 (Phila. C.P., Crim. Div. Apr. 13, 2006) (stipulated penalty-phase relief)

Commonwealth v. Kemp, Apr. Term, 1997, No. 0009 (Phila. C.P., Crim. Div. Apr. 13, 2006) (stipulated penalty-phase relief)

Commonwealth v. Rucci, Nos. 2164 of 1990 (Wash. C.P., Crim. Div., Apr. 12, 2006)

Commonwealth v. Sattazahn, No. 2194-89 (Berks C.P., Crim. Div., March 31, 2006)

Commonwealth v. Johnson (William), Sept. Term, 1991, Nos. 3613, 3616-3618 (Phila. C.P. Dec. 12, 2005) (stipulated penalty-phase relief)

Commonwealth v. Hill, May Term, 1991, Nos. 0041-45, 1839-1841(Phila. C.P. Dec. 5, 2005) (stipulated penalty-phase relief)

Commonwealth v. Douglas, Aug. Term, 1981, Nos. 2326-27 & 2335 (Phila. C.P. Nov. 10, 2005)

Commonwealth v. Ligons, May Term, 1998, No 0086 (Phila. C.P., Crim. Div., June 23, 2005)

Commonwealth v. Collins (Rodney), Aug. Term, 1992, Nos. 1588-1590 (Phila. C.P. Feb. 16, 2005)

Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., Nov. 23, 2004) (Philadelphia, PCRA) (stipulated penalty-phase relief)

Commonwealth v. Fisher (Jonathan), No. 4631-99 (Mtgy. C.P. Aug. 6, 2004) (Montgomery, PCRA) (stipulated penalty-phase relief)

Commonwealth v. Walker, May Term, 1991, Nos. 2770-2776, bench order (Phila. C.P. Apr. 21, 2004) (Philadelphia, PCRA)

Commonwealth v. Martin, No. 93-10899, *slip op.* (Leb. C.P. March 4, 2004)

Commonwealth v. Sneed, June Term, 1984, Nos. 674-676, *slip op.* (Phila. C.P. Nov. 25, 2003) (in support of Jan. 4, 2002 order granting PCRA relief)

Commonwealth v. Williams (Kenneth), No. 981/1984, *slip op.* (Lehigh C.P. Oct. 17, 2003)
Commonwealth v. Cook, Aug. Term, 1987, No. 2651 2/2 (Phila. C.P. March 13, 2003)
Commonwealth v. Keaton, March Term, 1993, No. 1925 (Phila. C.P. March 10, 2003)
Commonwealth v. Harris, Sept. Term, 1992, No. 342-352 (Phila. C.P. Sept. 12, 2002)
Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491, *slip op.* (Phila. C.P. Aug. 28, 2002) (in support of June 12, 2001 order granting PCRA relief)
Commonwealth v. Craver, No. 1902-93 (Del. C.P., Crim. Div. June 21, 2002)
Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. May 22, 2002)
Commonwealth v. Collins (Ronald), May Term, 1992, Nos. 2253-2256, June Term, Nos. 1477-1486 (Phila. C.P. Mar. 7, 2002)
Commonwealth v. McNair, Dec. Term, 1987, No. 2459-2463 (Phila. C.P. Feb. 19, 2002) (Philadelphia, PCRA)
Commonwealth v. Counterman, No. 2500 of 1988 (Lehigh C.P. Aug. 27, 2001)
Commonwealth v. Reyes, No 1388-93 (Del. C.P. July 2, 2001)
Commonwealth v. Moore, No. 22 of 1983, *slip op.* (Luzerne C.P. Sept. 22, 2000)
Commonwealth v. Wilson, July Term, 1988, Nos. 3267-3273 (Phila. C.P. Aug. 19, 1999)
Commonwealth v. Edwards, Nos. 84 -- CR 529, 996 (Lack. C.P. June 16, 1999)
Commonwealth v. Bryant (Robert), No. CC 8407686A (Allegheny C.P. Mar. 24, 1998)
Commonwealth v. Rolan, Feb. Term, 1984, Nos. 2893-2896, *slip op.* (Phila. C.P. March 5, 1997)
Commonwealth v. Terry, No. 1563-79, *slip op.* (Mtgy. C.P. Oct. 22, 1996)

Remands for Evidentiary Hearings

Commonwealth v. Hughes, No. 313 Cap. App. Dkt., 2004 WL 3050831 (Pa. Dec 21, 2004)
Commonwealth v. McGill, No. 225 Cap. App. Dkt., 2003 WL 22227989 (Pa. Sept. 29, 2003)
Commonwealth v. Basemore, 744 A.2d 717 (Pa. Jan. 20, 2000)
Commonwealth v. Williams, 557 Pa. 207, 732 A.2d 1167 (Pa. June 4, 1999)

B. Federal Court Cases

Rompilla v. Beard, 125 S. Ct. 2456 (U.S. June 20, 2005)
Wiggins v. Smith, 539 U.S. 510 (U.S. June 26, 2003)
Williams v. Taylor, 529 U.S. 362 (U.S. April 18, 2000)

Jermyn v. Horn, 266 F.3d 257 (3d Cir. Sept. 21, 2001), *reh'g denied* Jan. 4, 2002

Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007)
Marshall v. Beard, No. 03-CV-795 (E.D. Pa. Jan. 10, 2007) (stipulated penalty-phase relief)
Crews v. Horn, 3:98-CV- 1464 (M.D. Pa. Aug. 28, 2006) (stipulated penalty-phase relief)
Lewis v. Horn, No. 00-CV-802, 2006 WL 2338409 (E.D. Pa. Aug. 9, 2006)
Bond v. Beard, No. 02-cv-08592-JF (E.D. Pa. Apr. 24, 2006)

Thomas v. Horn, No. 2:00-cv-00803-LP (E.D. Pa. Aug. 19, 2005)
Rollins v. Horn, No. 2:00-CV-01288-JCJ, 2005 WL 1806504 (E.D. Pa. July 29, 2005)
Rivers v. Horn, No. 02-1600 (E.D. Pa. May 10, 2005) (stipulated penalty-phase relief)
Blystone v. Horn, No. 99-CV-490 (W.D. Pa. Mar. 31, 2005)
Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. Feb 1, 2002)
Peterkin v. Horn, 176 F. Supp. 2d 342 (E.D. Pa. Nov. 6, 2001)
Laird v. Horn, 159 F. Supp. 2d 58 (E.D. Pa. Sept. 5, 2001)
Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. Aug 27, 2001)
Holland v. Horn, 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001)
Jacobs v. Horn, 129 F. Supp. 2d 390 (M.D. Pa. Feb. 20, 2001)
Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. Nov. 10, 1998)
Buehl v. Vaughn, 1996 WL 752959, 1996 U.S. Dist. LEXIS 19509 (E.D. Pa. Dec. 31, 1996)

II. Failure to Investigate and Present Guilt-Stage Defenses

Commonwealth v. Brooks, 839 A.2d 245 (Pa. Dec. 30, 2003) (new trial granted for ineffectiveness of counsel in failing to prepare for trial where appointed counsel never met with defendant prior to trial and sole contact was a single pretrial telephone conversation of less than ½-hour; court says trial counsel *per se* ineffective for failing to meet with a capital client before trial).

Commonwealth v. Perry, 537 Pa. 385, 644 A.2d 705 (July 1, 1994) (failure to interview client prior to trial; failure to interview witnesses; failure to use investigator until the eve of trial; failure to realize that case was capitally charged).

Commonwealth v. Johnson (Raymond), No 3849/99 (Berks C.P., Crim. Div., Mar. 9, 2007) (counsel ineffective for (1) failing to investigate and interview eyewitnesses identified in police discovery, including witnesses who were three feet from the shooting and would have testified that the defendant did not shoot the victim; (2) failing to properly investigate and prepare alibi witnesses, resulting in presentation of alibi testimony for the wrong day of the week and the failure to present other available alibi witnesses; and (3) failing altogether to present an opening statement).

Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., June 29, 2005) (Philadelphia, PCRA) (new trial granted for ineffectiveness of counsel in failing to investigate and present a diminished capacity, voluntary intoxication, or heat of passion defense to reduce the degree of murder).

Commonwealth v. Small, No. 2844 CA 1995 (York C.P., Crim. Div., Dec. 16, 2004) (York, PCRA, new trial) (trial counsel (1) was ineffective in failing to interview and make reasonable efforts to locate and present two material witnesses who would have testified that a key

prosecution witness had confessed to killing the victim and (2) was ineffective and suffered from a conflict of interest when, as a result of his prior representation of a prosecution witness, he was aware that the witness had made a contemporaneous statement to the police that had not linked the defendant to the offense, but because he obtained that information confidentially, did not cross-examine the witness about his failure to contemporaneously implicate the defendant)

Commonwealth v. Thompson (Andre), Feb. Term, 1993, Nos. 2193-2200 (Phila. C.P. June 1, 2004) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to investigate and present alibi defense and in failing to investigate and challenge questionable eyewitness identification).

Commonwealth v. Fletcher, March Term, 1992, Nos. 6001-04 (Phila. C.P. Feb. 26, 2004) (failure to investigate and present favorable testimony of medical examiner who actually performed the autopsy)

Commonwealth v. Pelzer, Oct. Term, 1988, Nos. 3200, 3199, 3197, 3194 & 3205 (Phila. C.P. Jan. 29, 2003) (failure to challenge state's forensic pathology testimony)

Commonwealth v. Daniels, Oct. Term, 1988, Nos. 3175, 3178, 3181-82, 3187 & 3189 (Phila. C.P. Jan. 29, 2003) (same)

Rolan v. Vaughn, 445 F.3d 671 (3d Cir. Apr. 18, 2006) (new trial granted for counsel's ineffectiveness in failing to investigate and present evidence supporting guilt-stage claim of self-defense; state court decision was based upon an unreasonable appellate determination of fact, not supported by the record, that self-defense witness purportedly would not have been willing to testify for the defense at the time of trial), *aff'g*, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004).

Jacobs v. Horn, No. 01-9000, 395 F.3d 92 (3d Cir. Jan 20, 2005) (counsel ineffective for presenting diminished capacity defense without investigating and presenting extensive mental health evidence that was available in support of that defense)

Saranchak v. Beard, No. 1:CV-05-0317, 2008 WL 80411, 2008 U.S. Dist. LEXIS 1120 (M.D. Pa. Jan. 4, 2008) (new trial and sentencing granting for trial counsel's ineffectiveness in failing to investigate and present diminished capacity defense)

Rolan v. Vaughn, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004) (new trial granted for trial counsel's ineffectiveness in failing to interview and present eyewitness in support of claim of self-defense), *aff'd*, 445 F.3d 671 (3d Cir. 2006)

Faulkner v. Horn, No. 99 - 5986 (E.D. Pa. July 9, 2002) (stipulated order) (failure to investigate and present mental health defense to first-degree murder)

III. Failure to Investigate and Present Evidence on Incompetency to Stand Trial

Appel v. Horn, 250 F.3d 203 (3d Cir. May 3, 2001) (denial of counsel where appointed counsel failed to take any action in preparation for competency hearing for mentally ill defendant after defendant told counsel he did not want assistance of counsel)

IV. Failure to Request or Object to Instructions

State Cases

Commonwealth v. Chambers, 570 Pa. 3, 807 A.2d 872 (Pa. Sept. 26, 2002) (death sentence reversed for penalty-phase counsel's failure to object to erroneous jury instruction that all jurors must find at least one aggravating circumstance before the jury could consider the mitigating circumstances found by any of the jurors in the case)

Commonwealth v. Mikell, 556 Pa. 509, 729 A.2d 566 (Pa. April 23, 1999) (new trial granted for ineffective assistance of counsel for failure to request alibi instruction)

Commonwealth v. Blount, 538 Pa. 156, 647 A.2d 199 (Pa. Aug. 24, 1994) (death sentence reversed for ineffectiveness of counsel when counsel failed to object to trial court's erroneous response to a jury question concerning the evaluation of aggravating and mitigating circumstances; trial court improperly instructed the jury that, if they were not unanimous as to the existence of a mitigating circumstance, "you must take that [lack of unanimity] into consideration when you are weighing whether the mitigating [sic] outweigh the aggravating")

Commonwealth v. Chmiel, 536 Pa. 244, 639 A.2d 9 (Pa. March 4, 1994) (*Chmiel I*) (new trial granted for trial counsel's ineffectiveness in failing to request a "corrupt and polluted source" instruction when evidence supported inference that the Commonwealth's star witness – the defendant's brother – was an accomplice)

Commonwealth v. Wharton, 530 Pa. 127, 607 A.2d 710 (Pa. April 28, 1992) (counsel ineffective for failing to object to prejudicially deficient instruction on aggravating circumstance that "the offense was committed by means of torture" and for failing to "request a more specific instruction" that the torture aggravating circumstance requires the "specific intent to inflict unnecessary pain, or suffering or both pain and suffering in addition to the specific intent to kill")

Commonwealth v. Billa, 521 Pa. 168, 555 A.2d 835 (Pa. March 6, 1989)), *rearg denied* April 18, 1989 (new trial granted for counsel's ineffectiveness in failing to request a cautionary instruction explaining the limited scope of prior crimes evidence that had been deemed admissible to prove motive)

Commonwealth v. Pelzer, Oct. Term, 1988, Nos. 3200, 3199, 3197, 3194 & 3205 (Phila. C.P. Jan. 29, 2003), bench order (new trial granted for counsel's ineffectiveness in failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability) (co-defendant of Henry Daniels)

Commonwealth v. Daniels, Oct. Term, 1988, Nos. 3175, 3178, 3181-82, 3187 & 3189 (Phila. C.P. Jan. 29, 2003), bench order (Phila. C.P. Jan. 29, 2003) (new trial granted for counsel's ineffectiveness in failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability)) (co-defendant of Kevin Pelzer).

Federal Cases

Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. July 1, 2002) (Circuit panel unanimously holds that trial counsel was ineffective for failing to object to the trial court's prejudicially inaccurate response to the jury's inquiry as to whether it could "recommend life imprisonment with a guarantee of no parole"; although a defendant who is sentenced to life imprisonment is statutorily ineligible for parole under Pennsylvania law, defense counsel failed to object or to request a clarifying instruction after the trial court instead responded "no, absolutely not. . . . And the question of parole is absolutely irrelevant. I hope you understand that.")

Cross v. Price, No. 95-614, 2005 WL 2106559 (W.D. Pa. Aug. 30, 2005) (Beaver, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to request a curative instruction that Pennsylvania's life sentence carries no possibility of parole after the defendant told the sentencing jury that he would be eligible for parole from a life sentence after twenty years and, after serving back time on another offense, could be released to "get on with [his] life" after thirty-five years; counsel also ineffective for the predicate failure to properly prepare defendant for his penalty-phase testimony so as to avoid this "highly prejudicial" misstatement of state law).

Baker (Lee) v. Horn, No. 2:96-CV-00037-AB, 2005 WL 1949631 (E.D. Pa. Aug. 15, 2005) (new trial granted for ineffective assistance of counsel for counsel's failure to object to guilt-stage jury instruction on accomplice liability that permitted the jury to convict defendant of first-degree murder if either he or his co-defendant possessed the specific intent to kill; the instruction improperly diminished the prosecution's burden of proving beyond a reasonable doubt that the defendant himself possessed the specific intent to kill and permitted the jury to transfer the intent of his co-defendant).

V. Failure to Object to Improper Evidence or Argument

Commonwealth v. Duffey, 579 Pa. 186, 855 A.2d 764 (Pa. Aug. 18, 2004) (remand to post-conviction court to determine counsel's ineffectiveness for prosecution's impermissible comment on post-*Miranda* silence to rebut a mental health mitigation defense, in violation of due process

and Fifth Amendment, per *Doyle v. Ohio*, 426 U.S. 610 (1976) and Wainwright v. Greenfield, 474 U.S. 284 (1986))

Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (Pa. Sept. 17, 1997), *rearg. denied*, Nov. 13, 1997 (death sentence reversed for ineffective assistance of penalty-phase counsel for failing to object to prosecutorial misconduct when the prosecution improperly argued in closing that unless the jury sentenced the defendant to death, liberal judges would return him to streets)

Commonwealth v. McNeil, 545 Pa. 42, 679 A.2d 1253 (Pa. June 25, 1996) (counsel was ineffective in failing to object to penalty-phase admission of victim-impact evidence)

Commonwealth v. LaCava, 542 Pa. 160, 666 A.2d 221 (Pa. Sept. 19, 1995) (death sentence reversed for ineffective assistance of penalty-phase counsel for failing to object to prosecutor's improper closing argument that defendant – who was a drug dealer – should be sentenced to death in retaliation for society's victimization at the hands of drug dealers)

Commonwealth v. Small, No. 2844 CA 1995 (York C.P., Crim. Div., Dec. 16, 2004) (trial counsel was ineffective in failing to assert the marital privilege to bar the prosecution from eliciting testimony of a highly damaging alleged admission by the defendant to his wife)

Commonwealth v. Duffey, No. 84 CR 176 (Lack. C.P. Nov. 18, 2004) (remand from PCRA appeal) (appellate counsel ineffective for failing to raise on direct appeal claim that prosecutor and prosecution's mental health expert impermissibly commented on the defendant's post-*Miranda* silence to rebut a mental health mitigation defense)

Peterkin v. Horn, 176 F. Supp. 2d 342, 374 n.14 (E.D. Pa. Nov. 6, 2001) (trial counsel ineffective "to the extent that [he] failed to object to those portions of the prosecutor's closing arguments which we have previously found improper")

Cross v. Price, No. 95-614, 2005 WL 2106559 (W.D. Pa. Aug. 30, 2005) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to request a curative instruction that Pennsylvania's life sentence carries no possibility of parole after the defendant told the sentencing jury that he would be eligible for parole from a life sentence after twenty years and, after serving back time on another offense, could be released to "get on with [his] life" after thirty-five years; counsel also ineffective for the predicate failure to properly prepare defendant for his penalty-phase testimony so as to avoid this "highly prejudicial" misstatement of state law)

Smith (Clifford) v. Horn, 1996 WL 172047 (E.D. Pa. Feb. 22, 1996) (trial counsel ineffective for failing to object to prosecution's inaccurate and misleading statements in closing argument that "[n]o one knows for sure" whether the defendant would be executed if sentenced to death and that "Someday – and it won't be tomorrow, no matter what your decision is, and it will be years from now – but, someday conceivably people sitting in Harrisburg, who didn't sit here, could look at a bunch of papers and say 'We'll let him out; he's done enough time; it's time for parole.'

That could happen too."), 120 F.3d 400 (3d Cir. July 24, 1997) (granting new trial on unrelated grounds), *cert. denied*, 522 U.S. 1109 (Feb. 23, 1998)

Commonwealth v. Baker, 511 Pa. 1, 511 A.2d 777 (Pa. June 23, 1986) (death sentence reversed under *Caldwell v. Mississippi* and Article I, Section 13 of Pennsylvania Constitution as a result of argument that suggested that ultimate responsibility for whether the defendant lived or died rested in the appellate courts; prosecutor argued in 1981 trial that "The last person that was executed in this state was Elmo Smith and his crime was in 1959 . . . . He was the last person that was executed in 1963. You get an appeal after appeal after appeal, if you think the Supreme Court is going to let anybody get executed until they're absolutely sure that that man has a fair trial make no mistake about that. I'm not going to go any further. I just want you to understand that once you leave, that this man is not going to have the switch pulled in a matter of hours. That just doesn't happen. It goes on and on and on. I'm not going to sit here and tell you what the system is all about." Then, at the end of his summation, he reiterated: " but just understand this, no matter what your decision is, ladies and gentlemen, it will be and I can assure you as much as I am standing here right now, there will be considerable time and considerable appeals to be before any kind of finality occurs in this particular action."; although Court did not specifically address trial counsel's ineffectiveness in failing to object to this improper argument at trial, court granted relief under direct appeal relaxed waiver rule).

VI. Failures to Object to Improper Limitations on Defense Evidence, Cross-Examination, or Argument

Commonwealth v. Smith (Donald), 502 Pa. 600, 467 A.2d 1120 (Pa. Nov. 3, 1983) (Fayette, direct appeal) (new trial granted where defense counsel acquiesced in the trial court's ruling barring cross-examination of a key prosecution witness concerning her admission to having committed a similar robbery-homicide that the defendant – who was incarcerated at the time – could not have committed; the court distinguishes between impermissible use of the prior robbery-murder admission to impeach as "merely a general assault upon the veracity of the witness by showing prior criminal behavior of that witness" and permissible use of that evidence to "significantly undermine[ ] the truthfulness of the version of the facts presented by [the prosecution witness] in the trial in this case"; counsel's "failure . . . to recognize the full potential of this line of inquiry and to urge its allowance on proper grounds constitutes ineffective representation which standing alone would require an award of a new trial").

VII. Failures Relating to Guilty Pleas or Trial Waivers

Commonwealth v. Gribble, 863 A.2d 455 (Pa. Dec 21, 2004) (remand for determination of appellate counsel's ineffectiveness for failing to raise meritorious issue that defendant's waiver of jury sentencing was not knowing, intelligent, and voluntary), Commonwealth v. Gribble, Dec. Term, 1992, No. 2081-92 (Phila. C.P., Crim. Div., Mar. 8, 2007) (Philadelphia, PCRA remand)

(death sentence vacated for counsel's ineffectiveness and court error in waiving the defendant's personal right to a penalty-phase jury trial based upon a defective waiver colloquy).

Commonwealth v. Nieves, 560 Pa. 529, 746 A.2d 1102 (Pa. Feb. 17, 2000) (new trial granted for guilt-stage ineffectiveness of counsel where defendant waived right to testify because of counsel's erroneous advice that prosecution would impeach his testimony with evidence of his prior record; prior convictions for firearms and drug trafficking offenses that did not involve dishonesty or false statements were not admissible as impeachment evidence)

Commonwealth v. Bradley (Jerard), 552 Pa. 492, 715 A.2d 1121 (Pa. Aug. 7, 1998), *rearg. denied*, Sept. 30, 1998 (conviction and death sentence reversed for counsel's ineffectiveness in filing motion to withdraw guilty plea to third-degree murder; trial counsel, citing an adversarial relationship with his client, improperly followed client's expressed wishes and filed a motion to withdraw guilty plea to third degree without meeting with client and advising him of the potential consequences of withdrawing his plea)

Commonwealth v. Moran, Nov. Term, 1981, Nos. 3091 & 3092 (Phila. C.P. 1999) (Jan. 25, 1999) (Philadelphia, PCRA) (conviction overturned for counsel's ineffectiveness in failing to communicate plea offer to defendant)

VIII. Making Deficient or Affirmatively Harmful Argument

Commonwealth v. Cooper (Willie), No. 462 Cap. App. Dkt., 2007 WL 4557825 (Pa. Dec. 28, 2007) (affirming trial court's reversal of death sentence for ineffective assistance of penalty-phase counsel who improperly injected biblical argument into the case and urged the jury that the biblical admonition of "an eye for an eye" was limited to cases involving the killing of a pregnant woman, but his client had killed a pregnant woman), *aff'g*, Aug. Term, 2002, No. 840 1/1 (Phila. C.P. June 14, 2004).

Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007) (counsel ineffective, *inter alia*, for presenting an inadequate and harmful closing argument that was six sentences long, failed to challenge any of the Commonwealth's aggravating circumstances, and failed to argue for any of the mitigating circumstances counsel had presented).

Thomas v. Horn, No. 2:00-cv-00803-LP, 388 F. Supp. 2d 489 (E.D. Pa. Aug. 19, 2005) (counsel ineffective, *inter alia*, for providing a "grossly deficient" closing argument that "was, at best, incoherent").

Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. Nov. 10, 1998) (counsel ineffective for prejudicially misinforming the sentencing jury during his penalty-phase closing argument that it

had to unanimously agree to a sentence of life imprisonment before Christy could receive a life sentence).

Buehl v. Vaughn, 1996 WL 752959, 1996 U.S. Dist. LEXIS 19509 (E.D. Pa. Dec. 31, 1996), *aff'd*, 166 F.3d 163 (3d Cir. Jan. 20, 1999), *cert. dismissed*, 527 U.S. 1050 (U.S. June 25, 1999) (counsel ineffective for asserting in his opening statement in the guilt phase of the trial that this case " is first degree murder or nothing" and that whoever committed the murders should be put to death and for presenting a perfunctory argument for life in the penalty-phase closing that did not even address the small amount of mitigating evidence that was before the jury).

Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. July 31, 2003) (counsel ineffective, *inter alia*, for attempting to argue in closing that the defendant's age (19) was mitigating, without having presented any actual evidence of his age; the prosecution objected to the argument and the trial court instructed the jury: "You are to disregard that. There was no evidence concerning Damon Jones' age that was presented at this hearing.").

Commonwealth v. Moore, No. 22 of 1983, slip op. (Luzerne C.P. Sept. 22, 2000) (counsel's deficient penalty-phase closing argument included telling the sentencing jury that the defendant was from Philadelphia and rhetorically asking them "what more do you need to know?").

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Capital Habeas Unit
FEDERAL COURT DIVISION DEFENDER ASSOCIATION OF PHILADELPHIA
SUITE 545 WEST – THE CURTIS CENTER
601 WALNUT STREET
PHILADELPHIA, PA 19106

ELLEN T. GREENLEE
DEFENDER

PHONE NUMBER (215) 928-0520
FAX NUMBER (215) 928-0826
FAX NUMBER (215) 861-3508

MAUREEN KEARNEY ROWLEY
CHIEF FEDERAL DEFENDER

PENNSYLVANIA CAPITAL CASE SUMMARY OF GROUNDS FOR POST-CONVICTION REVERSAL

Compiled by
Robert Brett Dunham,
Director of Training

March 6, 2008

FEDERAL COMMUNITY DEFENDER OFFICE
FOR THE EASTERN DISTRICT OF PENNSYLVANIA
Capital Habeas Unit
FEDERAL COURT DIVISION DEFENDER ASSOCIATION OF PHILADELPHIA
SUITE 545 WEST – THE CURTIS CENTER
601 WALNUT STREET
PHILADELPHIA, PA 19106

ELLEN T. GREENLEE
DEFENDER

PHONE NUMBER (215) 928-0520
FAX NUMBER (215) 928-0826
FAX NUMBER (215) 861-3508

MAUREEN KEARNEY ROWLEY
CHIEF FEDERAL DEFENDER

PENNSYLVANIA CAPITAL CASE
SUMMARY OF GROUNDS FOR POST-CONVICTION REVERSAL

Compiled by
Robert Brett Dunham

1. Holland v. Horn, No. 01-9002 (3d Cir. March 6, 2008) (Philadelphia, habeas appeal), (adopting reasoning of the District Court granting a new sentencing hearing as a result of the denial of the right to present expert mental health testimony under *Ake v. Oklahoma*), *aff'g,* 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001).

2. Commonwealth v. Rainey, Apr. Term, 1990, Nos. 1967-1972 (Phila. C.P. Mar. 3, 2008) (Philadelphia, PCRA) (stipulated penalty-phase relief).

3. Commonwealth v. Whitney, Nov. Term, 1981, Nos. 1416-1429 (Phila. C.P. Jan. 16, 2008) (Philadelphia, PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

4. Commonwealth v. Hanible, April Term, 1999, No. 0902 (Phila. C.P. Jan. 8, 2008) (Philadelphia, PCRA) (stipulated penalty-phase relief).

5. Saranchak v. Beard, No. 1:CV-05-0317 (M.D. Pa. Jan. 4, 2008) (Schuylkill, habeas) (new trial and sentencing for counsel's ineffectiveness in failing to investigate and present diminished capacity defense).

6. Hardcastle v. Horn, No. 98-CV-3028, 2007 WL 3102221, 2007 U.S. Dist. LEXIS 78073 (E.D. Pa. Oct. 19, 2007) (Philadelphia, habeas remand) (new trial granted for violation of *Batson v. Kentucky* where prosecutor exercised 13 of 15 peremptory challenges against minority jurors, struck 12 of 14 black jurors and the only Hispanic juror to survive challenges for cause, and the jury ultimately empaneled consisted of 11 white jurors, one

black juror and two white alternates, and the prosecution's explanations for six of the strikes against black jurors were found to be pretextual).

7. Baker v. Horn, No. 96-CV-0037 (E.D. Pa. Sept. 6, 2007) (Philadelphia, habeas) (stipulated grant of a new trial on all charges without admission of any particular constitutional error), non-capital retrial.

8. Commonwealth v. Miller, Nos. 2775 & 2787 C.D. 1992 (Dauph. C.P., Crim. Div., Aug. 24, 2007) (Dauphin, PCRA remand, *Atkins*) (as a result of defendant's mental retardation, death sentences vacated under *Atkins v. Virginia* and consecutive life sentences imposed).

9. Commonwealth v. Pirela, No. 448 Cap. App. Dkt. (Pa. Aug. 20, 2007) (per curiam) (Philadelphia, PCRA appeal, *Atkins*) (affirming PCRA court's grant of relief under *Atkins* with a one sentence parenthetical citation to the proposition that "when Post Conviction Relief Act court findings are supported by substantial evidence and legal conclusion is not clearly erroneous, determination petitioner is mentally retarded and cannot be executed is affirmed").

10. Commonwealth v. DeJesus, Nov. Term, 1997, No. 350 1/1 (Phila. C.P. Aug. 10, 2007) (Philadelphia, PCRA, *Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

11. Commonwealth v. Jones (Damon), Sept. Term, 1992, Nos. 714 *et. seq.* (Phila. C.P. Aug. 3, 2007) (Philadelphia, PCRA remand) (stipulated relief for direct appeal counsel's ineffectiveness in failing to investigate and present claim that trial counsel was ineffective in failing to investigate and present available mitigating evidence; appellate counsel's affidavit indicated that he believed he was limited to raising record-based claims on appeal).

12. Commonwealth v. Weiss, No. 218 Crim 1997 (Ind. C.P. July 31, 2007) (Indiana, PCRA) (new trial granted for "overwhelming" violation of *Brady v. Maryland* when prosecution withheld from the defense impeachment information relating to the testimony of three prison informants, as well as for court ruling denying a defense motion to permit trial counsel to withdraw from the case because of an actual conflict of interest arising out of counsel's simultaneous representation of one of these informants)
    * court finds it "crystal clear" that the prosecution "failed to disclose information to the petitioner's attorney to aid him" in the defense and "find[s] the Commonwealth's conduct outrageous";
    * court states that "[f]or [the trial prosecutor] to testify at the PCRA hearing in this matter that in his opinion credibility of the Commonwealth's key witnesses that identified the defendant Ronald Weiss in this matter was not really an important issue is beyond belief";

* the PCRA court held that defense counsel's representation of both the defendant and a prosecution witness at the time of the trial "obviously was an actual conflict" of interest, and found it "most disturbing" that the trial court denied the defense petition to be removed from the case because of this conflict without conducting a hearing or making any record regarding the defense request.

13. Wallace v. Price, Nos. 03-9002 & 03-9003, 243 Fed.Appx. 710, 2007 WL 1954047 (3d Cir. July 6, 2007) (Washington, habeas appeal) (non-precedential) (revised opinion affirming in all respects District Court judgment granting new trial for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement).

14. Lark v. Beard, 2:01-cv-01252, 495 F. Supp. 2d 488 (E.D. Pa. July 3, 2007) (Philadelphia, habeas) (new trial granted under *Batson v. Kentucky* for prosecution's discriminatory exercise of peremptory challenges when petitioner presented evidence of a *prima facie Batson* violation and the prosecutor was unable to produce any race-neutral reasons for his strikes of three African-American jurors).

15. Commonwealth v. Gibson (Jerome), Nos. 378, 380, 467 Cap. App. Dkt., 925 A.2d 167 (Pa. June 26, 2007), *aff'g* Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. Nov. 26, 2004) (Bucks, PCRA *Atkins* appeal) (affirming lower court's determination that as a result of defendant's mental retardation, death sentence must be vacated under *Atkins v. Virginia*) (resentenced to life).
* court holds that for death penalty purposes, "the standards set forth in the DSM-IV and by the AAMR are appropriate measures" of mental retardation;
* court recognizes that it is "possible to diagnose mental retardation in individuals with IQ scores between 71 and 75, if they have significant deficits in adaptive behavior"
* where various experts had testified that the defendant's IQ was within the 70 to 75 range, the defendant had been evaluated with a formal assessment instrument called the Adaptive Behavior Assessment System and clinical evaluations that showed adaptive deficits that met the DSM/AAMR diagnostic criteria, and evidence showed onset prior to age 18, the lower court's finding of mental retardation was supported by the record.

16. Morris v. Beard, No. 01-3070, 2007 WL 1795689, 2007 U.S. Dist. LEXIS 44707 (E.D. Pa. June 20, 2007) (Philadelphia, habeas) (death sentence reversed for ineffective assistance of counsel in penalty phase for failing to investigate and present available mitigating evidence; new sentencing hearing also granted under *Mills v. Maryland* where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

* court relies upon 1989 ABA Guidelines for Appointment and Performance of Counsel in Death Penalty Cases for national norm of professional conduct in effect at time of 1983 trial that "counsel had a duty to ensure that all reasonably available mitigating evidence is presented to the jury in the most effective possible way"; counsel's performance was deficient when he presented only petitioner and his mother in mitigation and elicited from his mother only the date of petitioner's birth; that he had been an psychiatric inpatient in January 1977; that he five brothers and a sister with whom he had no problems; that his father was killed one year prior to trial; that petitioner was the father of a child; and that his skin turned a bluish tint when he becomes agitated.
* the fact that counsel presented" some mitigating evidence" did not render his investigation and presentation reasonable when that evidence "bore little resemblance to the picture of Morris's childhood and mental condition encompassed in the mitigating evidence that counsel failed to discover"
* counsel's deficient performance was prejudicial where a proper investigation of Morris's childhood and mental health would have disclosed petitioner's abuse and neglect at the hands of an alcoholic father; numerous childhood head injuries and severe headaches; a history of erratic behavior, learning disabilities, and mental and emotional disturbances; psychiatric hospitalizations and anti-psychotic medication; exposure to street fights and violence; and institutional records indicating cognitive impairments and possible brain damage.
* counsel was ineffective for presenting an inadequate and harmful closing argument that was six sentences long, failed to challenge any of the Commonwealth's aggravating circumstances, and failed to argue for any of the mitigating circumstances counsel had presented; "trial counsel's decision not to reference any mitigating factors in his closing argument at the penalty phase, coupled with his lack of investigation, preparation, and presentation of mitigating evidence, is . . . incomprehensible."

- Wallace v. Price, Nos. 03-9002 & 03-9003, 2007 WL 1732559 (3d Cir. June 18, 2007) (*Wallace II*) (Washington, habeas corpus appeal) (non-precedential) (affirming in all respects District Court judgment granting new trial for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement), *aff'g* Wallace v. Price, 265 F. Supp. 2d 545 (W.D. Pa. Mar. 31, 2003), *vacated and substitute opinion issued*, 243 Fed.Appx. 710, 2007 WL 1954047 (3d Cir. July 6, 2007).

17. Commonwealth v. Tilley, Dec. Term, 1985, Nos. 1078-82 (Phila. C.P. April 30, 2007) (Philadelphia, PCRA) (stipulated penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

18. Commonwealth v. Johnson (Raymond), No 3849/99 (Berks C.P., Crim. Div. Mar. 9, 2007) (Berks, PCRA) (new trial granted for ineffective assistance of counsel, including counsel's ineffectiveness for failing to investigate and interview eyewitnesses based upon

the police discovery and failure to investigate defendant's alibi defense, which resulted in counsel's presenting an alibi for the wrong day; death sentence reversed for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

* counsel's trial ineffectiveness included failing to investigate and present witnesses who testified in the post-conviction proceedings that they were three feet from the shooting and that the defendant did not shoot the victim;

* counsel ineffective for failing to properly investigate and prepare alibi witnesses, where the witnesses both testified that the night was Wednesday, June 18, and the shooting had occurred on Tuesday, June 18), and other available alibi witnesses were not presented; one alibi witness testified in post-conviction that defense counsel never spoke with her except in court and the defense counsel testified he didn't like the witness; the court determined that counsel either should have properly prepared the witnesses or not put on an alibi defense;

* the court found that counsel's failure to present an opening statement in a capital case was further evidence of deficient preparation, although not in itself sufficient proof of ineffectiveness;

* counsel's penalty-phase ineffectiveness included a failure to present *any* available teachers, siblings, or mental health experts in mitigation.

19. Commonwealth v. Gribble, Dec. Term, 1992, No. 2081-92 (Phila. C.P., Crim. Div., Mar. 8, 2007) (Philadelphia, PCRA remand) (death sentence vacated for counsel's ineffectiveness and court error in waiving the defendant's personal right to a penalty-phase jury trial based upon a defective waiver colloquy).

20. Commonwealth v. Thomas (LeRoy) a/k/a John Wayne, Dec. Term, 1994, No. 700 (Phila. C.P. Jan. 11, 2007) (Philadelphia, PCRA) (stipulated penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence).

21. Marshall v. Beard, No. 03-CV-795 (E.D. Pa. Jan. 10, 2007) (Philadelphia, habeas) (stipulation to grant of penalty-phase relief on petitioner's claim of penalty-phase ineffectiveness for failing to investigate and present mitigating evidence).

- Lark v. Beard, 2:01-cv-01252 (E.D. Pa. Oct.. 25, 2006) (Philadelphia, habeas) (stipulation to grant of penalty-phase relief on petitioner's claim of penalty-phase ineffectiveness for failing to investigate and present mitigating evidence).

22. Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 3, 2006) (Lehigh, PCRA remand) (post-trial and direct appeal counsel ineffective for failing to properly present issue of sentencing-stage counsel's predicate ineffectiveness in failing to investigate and present mitigating evidence of defendant's traumatic childhood and mental health issues arising, *inter alia*, out of his post-traumatic stress disorder)

* Ineffectiveness included counsel's failures to provide the post-verdict and appeal courts with affidavits and supporting materials that would have permitted evidentiary development and appellate review of this issue;
* Post-trial and direct appeal counsel also ineffective for failing to preserve and raise record-based claim that the trial court improperly prevented the defense from presenting expert mental health mitigation testimony relating to the defendant's lack of future dangerousness if incarcerated;
* Opinion incorporated by reference the PCRA court's prior determination in Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003) that trial counsel had provided ineffective assistance with respect to these issues

23. Crews v. Horn, 3:98-CV- 1464 (M.D. Pa. Aug. 28, 2006) (Perry, habeas) (stipulated grant of penalty-phase relief on claim that penalty-phase counsel was ineffective for failing to investigate and present available mitigating evidence) (resentenced to two life sentences).

24. Commonwealth v. Clark, Dec. Term, 1993, Nos. 4115-19 (Phila. C.P. August 25, 2006), (Philadelphia, PCRA) (court issues *Opinion Sur Pa.R.A.P. 1925(a)* in support of its 2003 bench order reversing death sentence for sentencing-stage counsel's ineffectiveness "for failing to conduct any investigation regarding potential mitigating circumstances, including Clark's impaired mental health and his deprived childhood")

25. Wilson (Zachary) v. Beard, No. 05-CV-2667, 2006 WL 2346277, 2006 U.S. Dist. LEXIS 56115 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (new trial granted on habeas summary judgment for violations of *Brady v. Maryland* that prevented the defense from impeaching three separate prosecution witnesses)
* the prosecution violated *Brady* when it failed to disclose one of its witness' *crimen falsi* convictions for impersonating a police officer, and a psychological evaluation conducted in connection with one of these convictions; failed to disclose the psychiatric history of another of its witnesses; and withheld evidence that a third witness was a long-time informant for a corrupt police officer (later convicted of official misconduct in connection with another case), and that the informant had received interest-free loans from the officer;
* the first witness (Edward Jackson) had been arrested six weeks before the murder for impersonating a police officer; the pre-sentence investigation report ordered in connection with that conviction revealed that the witness "had two prior arrests for impersonating a police officer, a juvenile record, an adult record of thirteen arrests and four convictions, and an out-of-state record of six arrests"; the PSI also reported that the witness had suffered a prior serious head injury that had resulted in headaches, blackouts, and occasional memory loss; the psychological evaluation described the witness as "a marginal historian" who had twice fractured his skull, had "weak" long- and short-term memory, and could not think in abstract terms, and who had a schizoid personality disorder, "dissociative tendencies," and "distorted perceptions of reality" in which he "tends to go overboard in . . . attach[ing] himself to Police activities";

* the second witness (Jeffrey Rahming) testified against petitioner on the first day of trial and the next day was taken by police from the prosecutor's office to a local emergency room, where he was diagnosed with schizophrenia and referred for psychiatric placement; the hospital records for that treatment disclosed that the witness "has a history of mental illness" for which he had been treated with psychiatric medication "as recently as i months [sic] ago"; neither the emergency room visit nor the hospital records were disclosed to the defense; counsel testified that he would have requested Rahming's rap sheet, a prior mental health evaluation noted in the rap sheet, and the witness' presentence and probation reports had he been apprized of the mid-trial hospital visit. These records revealed that Rahming had a personality disorder, had a history of being prescribed anti-psychotic medication, which he might not have been taking at the time he allegedly witnessed the murder, that he was suspected of drug and alcohol abuse, and that had the demeanor of a "slightly retarded person";
* the third witness (Lawrence Gainer) was a police informant who had received interest-free loans from Officer John Fleming during the time period in which Gainer had acted as Fleming's informant; Fleming testified at trial that he and Gainer had been friends for thirteen years and that Fleming had used him as an informant "on many occasions," but that he had never paid Gainer for information or given him anything. In the state post-conviction proceedings, Fleming testified to having given Gainer interest-free loans over the years.

26. Lewis v. Horn, No. 00-CV-802, 2006 WL 2338409, 2006 U.S. Dist. LEXIS 55998 (E.D. Pa. Aug. 9, 2006) (Philadelphia, habeas) (death penalty reversed for penalty-phase counsel's ineffectiveness in failing to investigate and present available mitigating evidence concerning petitioner's mental illness, psychosis, and personality disorder; possible borderline retardation; brain damage; emotional impairments, and history of physical, sexual, and emotional abuse as a child. Counsel's numerous failures to present mitigating evidence included, *inter alia*, evidence that Petitioner's mother drank terpentine while pregnant; Petitioner's behavioral changes resulting from massive head injury sustained when father slammed Petitioner's head against bathtub when Petitioner was a young child; and episodes in which Petitioner tore up his room with a knife in what he believed was a fight with Satan).

27. Commonwealth v. Lesko, No. 681 C 1980 (Westm. C.P. Aug. 7, 2006) (Westmoreland, PCRA) (new trial granted for violation of Petitioner's right to testify at trial and for multiple violations of *Brady v. Maryland*; death sentence reversed on multiple grounds relating to counsel's failure to investigate and present mental health and social history mitigating evidence and for *Brady* violations)
* At trial, counsel told the court that he had reasons for not wanting Petitioner to testify but that he was "not sure whether my client is going to follow my advice." After being told to discuss this with Petitioner, counsel advised the Court that his client "told me he does wish to take the witness stand in his own behalf [but] he will follow my advice reluctantly" and not testify. In the post-conviction proceedings, Petitioner

acknowledged both that he wanted to testify and that counsel had advised him against testifying, but was unaware that he "had the absolute right to testify" and only learned that he would not be testifying when the defense closed without presenting him as a witness.

* The Court found a violation of Petitioner's right to testify when his co-counsel was colloquied extensively on whether he waived his right – including specific questioning on whether he was making that decision voluntarily and without coercion, yet no colloquy was conducted concerning Petitioner's waiver and nothing in the trial court record established that he personally chose to give up the right to testify. The Court found that in the absence of any evidence that Petitioner intended to waive his right to testify and in the special circumstances in which counsel had indicated that Petition actually wanted to testify, counsel's closing the defense case without requesting an on-the-record waiver was ineffective.

* The Court also found a violation of *Brady v. Maryland* from the combined effects of the prosecution's failure to produce several records that could have impeached Commonwealth witnesses. First, the prosecution presented the testimony of a witness (Daniel Keith Montgomery) who testified to being present when the co-defendant admitted to having "shot a cop" and Petitioner responded by saying, "I wanted to," and then laughed. However, the prosecution failed to disclose a prior state police report in which that witness had previously said "I don't know anything about the cop getting shot," and said nothing about any alleged statement by Petitioner that he wanted to shoot the officer. The prosecution also failed to provide the defense with a copy of a written agreement not to prosecute Montgomery for robberies that he had committed, and defense counsel never impeached Montgomery during cross-examination with evidence of this agreement. Third, the prosecution never disclosed entries in the juvenile court file of its witness Richard Rutherford that indicated that Rutherford had received favorable treatment in anticipation of his testimony at trial.

* The court reasoned that since testimony from Montgomery and Rutherford provided the only evidence of specific intent to kill – without which Petitioner could not be convicted of first degree murder – and that the Montgomery agreement and the Rutherford files provided impeachment material in addition to that already available to the defense at trial, "[q]uestioning their motivation for testifying [based on the withheld information] would have further whittled away at the inconsistent statements that each of them made in various proceedings and in statements concerning to what the Petitioner's evidenced intent was." The court found materiality both with respect to Petitioner's 1981 trial and 1995 re-sentencing hearing, and granted both a new trial and a new sentencing.

* The court also granted penalty relief on numerous other grounds. Related to the *Brady* violations, it held that counsel was ineffective in failing to impeach Montgomery's testimony at the 1995 re-sentencing with prior inconsistent testimony from his testimony in the first trial. During the 1995 re-sentencing trial, Montgomery testified that he had participated with Travaglia in numerous robberies that had occurred prior to 1981. However, in the 1981 trial, Montgomery had denied that he participated in robberies with the defendants. The court viewed this failure in conjunction with the other failures to impeach based upon prior inconsistent statements, and determined that it resulted in "a

reasonable probability that the outcome of the proceedings – that the jury found the Petitioner to have the requisite intent – would have been different, but for these errors." Accordingly, the Petitioner is entitled to a new sentencing hearing.

* The Court also granted relief on numerous grounds relating to the failure to investigate and present a wide range of available mitigating evidence. These included: (1) a violation of *Ake v. Oklahoma* when trial counsel was aware of need for neuropsychologist but instead retained a clinical psychologist who could not conduct tests for brain damage; (2) counsel's ineffectiveness in hiring psychologist on the eve of trial and failing to provide him extensive social service records that materially altered his diagnosis; and (3) counsel's ineffectiveness in failing to investigate "vivid" evidence of "medical neglect, educational neglect, social services neglect, and the recognition that the Petitioner needed psychological treatment at an early age" and overwhelming evidence of "cumulative acts of neglect and abuse" that were "seemingly endless and relentless."

* The court found counsel deficient for failing to present available social service records chronicling Petitioner's hellish upbringing and its psychological consequences, for failing to present live testimony from social service workers, for failing to fully present psychological expert testimony, for failing to obtain the assistance of a neuropsychologist and present available evidence of brain damage, for failing to present mitigation testimony from a number of family members and neighbors, for failing to present mitigating evidence in the 1995 re-sentencing that had been presented in the original 1981 sentencing hearing, and for failing to elicit the full range of mitigating evidence that was available from the witnesses he did present.

28. Commonwealth v. Hutchinson, Apr. Term, 1998, No. 0858 (Phila. C.P., Crim. Div., July 25, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief)

29. Commonwealth v. Williams (Craig), May Term, 1987, Nos. 2563-2565 (Phila. C.P., Crim. Div., July 11, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief)

30. Commonwealth v. Sattazahn, No. 2194-89, 2006 Pa. Dist. & Cnty. Dec. LEXIS 104 (Berks C.P., Crim. Div., June 23, 2006) (Berks, PCRA) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence, including "his background and his very significant organic brain impairment").

* court finds "Defendant's counsel was ineffective in failing to interview family and other lay witnesses who were readily identifiable and reasonably available to testify; for presenting only pages of direct testimony in Defendant's case for life; for failing to obtain available institutional records; for failing to conduct any investigation into Defendant's psychiatric condition and mental impairments, despite obvious signs of brain damage that clearly pointed to the need to obtain the assistance of mental health experts."

* Court holds that "Defendant's counsel failed to adequately investigate substantial mitigating factors, even though the record was replete with 'red flags' of brain damage that indicated the need for neuropshyschological [sic] evaluations. In light of the extensive medical and scientific evidence presented in the PCRA petition and subsequent

testimony at hearings regarding Defendant's neglectful parenting, social isolation and impaired social development, significant educational impairments and learning disabilities, odd risk-taking behaviors, organic brain damage, mental illness and other potential statutory mitigators, we find that Defendant's counsel, notwithstanding his late entry into the case, failed to fulfill his obligation to explore all avenues that might lead to mitigating circumstances."

* Prejudice established because the "substantial and available mitigation evidence [that] was not presented at trial . . . was reasonably likely to have persuaded one or more jurors to find a mitigating circumstance that had not been presented."

31. Commonwealth v. Gorby, No. 385 Cap. App. Dkt., 589 Pa. 364, 909 A.2d 775 (Pa. June 20, 2006) (Washington, PCRA appeal) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate, develop, and present life history and mental-health mitigating evidence, including evidence of childhood abuse and neglect; and a cognitive disorder diminishing, *inter alia,* defendant's reasoning, judgment, and impulse control; counsel's performance deficient for failing to interview readily available life-history witnesses, obtain medical and social history records, and explore mental-health issues that were apparent from the circumstances of the offense and the defendant's background; counsel also ineffective for failing to adequately develop a mitigation claim relating to the defendant's intoxication; and for failing to request an instruction explaining the relevance under 42 Pa. C.S. § 9711(e)(8) of the limited evidence that counsel did present; direct appeal counsel was ineffective for failing to present any claim of trial counsel penalty-phase ineffectiveness).

32. Commonwealth v. Sneed, No. 366 Cap. App. Dkt., 587 Pa. 318, 899 A.2d 1067 (Pa. June 19, 2006) (Philadelphia, PCRA appeal) (trial counsel ineffective for failing to investigate and present social history and mental health mitigating evidence; grant of new trial on *Batson* claim reversed on procedural grounds), *aff'g in part and reversing in part* Commonwealth v. Sneed, June Term, 1984, Nos. 674-676 (Phila. C.P. Jan. 4, 2002).

33. Commonwealth v. May, No. 415 Cap. App. Dkt., 587 Pa. 184, 898 A.2d 559 (Pa. May 25, 2006) (Lebanon, PCRA appeal) (death sentence reversed for trial/appellate counsel's ineffectiveness in failing to challenge trial court's ruling sustaining prosecution's objection to the relevance and admissibility of mitigating evidence that defendant's father physically and sexually abused him, and forced him to watch his father physically and sexually abuse his sisters and mother)

* trial court agreed with prosecution's argument that the use of the conjunctive "and" in 42 Pa. C.S. § 9711(e)(8), permitting defense to present "any other evidence of mitigation concerning the character *and* record of the defendant and the circumstances of his offense" "limited the admissible mitigation evidence to that which addressed both character and record"; trial court improperly sustained the objection, finding the proffered child abuse evidence irrelevant to defendant's record;

* court reverses, stating "[n]ot only is such evidence relevant, its presence is a necessary component of a fair and complete sentencing proceeding. We hold that the failure of trial counsel to object to such an egregious mistake by the trial court constitutes ineffective assistance of counsel from which May suffered prejudice."

34. Commonwealth v. Gibson (Ronald), Jan. Term 1991, No. 2809 (Phila. C.P. Apr. 26, 2006) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness "in failing to conduct any investigation at all regarding mitigating evidence" and for appellate counsel's ineffectiveness "for failing to investigate and pursue non-record based claims of trial counsel's ineffectiveness for purposes of direct appeal")
* counsel's performance deficient where investigator "did no advance work whatsoever in preparation for the penalty phase"; "did not search for or collect documents relating to [the defendant's] family background and family history"; and had only "extremely limited" interaction before the penalty phase with those potential witnesses who happened to be in court when the penalty phase started;
* counsel also failed to investigate the defendant's drug use and its implications for mitigation; obtained no records except through the discovery process; "had little time to prepare for the case and . . . did not go to the prison where the defendant was incarcerated," but instead met with the defendant only "when he saw his client in the courtroom" and did not learn of his client's alcoholism until *during* the trial; counsel "basically took a fee, did no preparation at all[,] and went to court";
* counsel's failures prejudicial where "even a cursory investigation . . . would have uncovered evidence of [defendant's] intoxication at the time of the crime, defendant's personal and family history of drug and alcohol abuse, and a dysfunctional family life"; serious interviews with family members would have disclosed defendant's "exposure to years of domestic violence and the subsequent abandonment by his father," after which his mother lived with a series of other men "who abused her in the home and exhibited violent behavior";
* penalty-phase evidence presented by the defense was "a sham effort to elicit positive character testimony from witnesses who would 'cry and beg the jury not to sentence Ronald to death'"; "[t]his shocking lack of preparation was so far below the standard of adequate representation as to render the concept of effective assistance of counsel virtually meaningless";
* appellate counsel was ineffective where he "presented certain ineffectiveness claims based upon the record on direct appeal, [but] failed to investigate and present non-record based claims"; "[g]iven the total lack of preparation for the penalty phase by trial counsel, which is blatantly obvious from the transcript of the penalty-phase hearing, . . . appellate counsel was obligated to pursue such non-record based claims";
* appellate counsel's stated belief that "his obligation . . . concerned review only for record-based claims" had no reasonable basis designed to effectuate his client's interests; this failure was prejudicial because "there is a reasonable probability that, but for appellate counsel's failure to investigate and present trial counsel's ineffectiveness on direct appeal, the outcome of the appeal would have been different"; "[t]he assertion of

appellate counsel of the total, complete[,] and utter failure of trial counsel to perform any investigation for the penalty phase, in all likelihood, would have led to a different result on appeal."

35. Bond v. Beard, No. 02-cv-08592-JF, 2006 WL 1117862, 2006 U.S. Dist. LEXIS 22814 (E.D. Pa. Apr. 24, 2006) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present available mitigating evidence where "if counsel had fulfilled their obligation of conducting a reasonable investigation, very significant evidence could have been presented to the jury in mitigation"; court also finds "cause for concern" with penalty-phase closing argument that "seem[ed] designed to create a lynch-mob mentality on the part of the jury" that "represents an unacceptable appeal to class prejudice, an 'us against them' approach to the case")
* counsels' performance deficient where counsel interviewed some of the defendant's family members prior to his trials and arranged for interview by psychologist, but did not obtain any of defendant's school or hospital records or provide any institutional records to the psychologist, asked the psychologist to provide advice on pre-trial mental health issues, not mitigation, and did not actually begin to prepare for the penalty phase until after the jury returned guilty verdict on first degree murder;
* counsels' performance prejudicial where they haphazardly presented testimony of mother, sister, and other family members in attempt to elicit evidence of difficult childhood, general good-naturedness, devastation from loss of stepfather, and disappointment in failing GED exam but never learned and did not present evidence "deplorable upbringing," including that "[h]e was abandoned by his father at a very early age, was frequently absent from school because he had no shoes or warm clothing to wear, was physically beaten by siblings at the behest of his mother, who was an alcoholic and largely bereft of maternal instincts";
* prejudice also included failure to obtain school records that indicated, *inter alia*, that "he was, at best, borderline retarded, and suffered from learning disabilities and other psychological problems"; counsel also failed to present medical records showing that. while a teenager, the defendant "was struck in the head with a metal jack-handle, and suffered severe injuries" that required hospitalization for nine days and resulted in permanent brain damage;
* available mental health evidence also included that petitioner had Post-Traumatic Stress Syndrome and "organic brain damage [that] substantially impaired his ability to conform his conduct to the requirements of law";
* counsel also ineffective for "operating under the assumption that sympathy for the defendant's plight could be accepted by the jury as a reason for choosing a life sentence," whereas sympathy was not an independent mitigating circumstance and "could be considered only to the extent that it arises from the evidence of other, authorized mitigating circumstances."

36. Rolan v. Vaughn, 445 F.3d 671 (3d Cir. Apr. 18, 2006) (Philadelphia, habeas appeal) (new trial granted for counsel's ineffectiveness in failing to investigate and present

evidence supporting guilt-stage claim of self-defense; state court decision was based upon an unreasonable appellate determination of fact, not supported by the record, that self-defense witness purportedly would not have been willing to testify for the defense at the time of trial), *aff'g*, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004).

37. Commonwealth v. McCrae, Feb. Term, 1999, No. 0452 (Phila. C.P., Crim. Div. Apr. 13, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief) (resentenced to life).

38. Commonwealth v. Kemp, Apr. Term, 1997, No. 0009 (Phila. C.P., Crim. Div. Apr. 13, 2006) (Philadelphia, PCRA) (stipulated penalty-phase relief) (resentenced to life).

39. Commonwealth v. Rucci, Nos. 2164 of 1990 (Wash. C.P., Crim. Div., Apr. 12, 2006) (Washington, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present available mental health mitigating evidence, including a history of childhood seizures and convulsions, multiple head traumas, and brain injuries identifiable from medical records and that collectively resulted in organic brain damage affecting the portions of the brain responsible for impulse control and inhibition; and for failing to obtain and present "school records, home environment (abuse) and social history" mitigating evidence) (resentenced to life).

- Commonwealth v. Sattazahn, No. 2194-89, *Order Granting PCRA Relief* (Berks C.P., Crim. Div., March 31, 2006) (Berks, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to adequately investigate and present mitigating evidence).

40. Commonwealth v. Collins (Ronald), Nos. 372 & 373 Cap. App. Dkt., 888 A.2d 564 (Pa. Dec. 27, 2005) (Philadelphia, PCRA appeal) (affirmed PCRA court's grant of penalty-phase relief for counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence; counsel's investigation was deficient where he failed to conduct a social history investigation, could not remember interviewing defendant or family about defendant's medical history, failed to inquire about head injury, and did not obtain school records; failures were prejudicial where available medical records would have provided evidence of a serious head injury, which would have led expert to recommend neuropsychological testing, materially affected the expert's recommendations to counsel, and would have led to the presentation of mitigating evidence that the defendant had an extreme mental or emotional disturbance and significantly impaired capacity at the time of the offense).

41. Commonwealth v. Johnson (William), Sept. Term, 1991, Nos. 3613, 3616-3618 (Phila. C.P. Dec. 12, 2005) (Philadelphia, PCRA) (stipulated penalty-phase relief).

42. Commonwealth v. Hill, May Term, 1991, Nos. 0041-45, 1839-1841(Phila. C.P. Dec. 5, 2005) (Philadelphia, PCRA) (stipulated penalty-phase relief).

43. Commonwealth v. Zook, No. 293 Cap. App. Dkt., 585 Pa. 11, 887 A.2d 1218 (Pa. Nov. 28, 2005) (Lancaster, PCRA appeal) (death sentence reversed for penalty-phase ineffectiveness of counsel arising out of counsel's failure to investigate and present mitigating evidence of violent personality change caused by a serious head injury, and failure to provide mental health expert with the available hospital and prison records that documented both the fact of the head injury and the details of the defendant's personality change) (resentenced to life following prosecution decision to waive death).

44. Commonwealth v. Douglas, Aug. Term, 1981, Nos. 2326-27 & 2335 (Phila. C.P. Nov. 10, 2005) (Philadelphia, PCRA) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present mitigating evidence of dysfunctional family background, positive adjustment to prison, and possible brain damage)
* Court finds that trial counsel "did not begin preparation for the penalty phase of petitioner's trial until after a guilty verdict was returned, leaving him only one day to investigate, secure witnesses, and properly interview those witnesses who were confirmed to testify at the penalty phase. Leaving the preparation to the last minute rendered [counsel] unable to realistically fulfill his constitutional duty as effective counsel to petitioner."
* Counsel's presentation of two mental health experts "without interviewing them prior to their testimony cannot be reasonably considered effective assistance of counsel."
* Court finds prejudice because "[i]n light of the fact that the jury found no mitigating circumstances, we conclude that if evidence of petitioner's dysfunctional family life, possible brain damage, and positive adjustment to prison[] had been presented, at least one juror would have found mitigating factors that outweighed the aggravating factors."
* Court holds that under *Strickland* "trial counsel's last-minute preparation for the sentencing hearing and failure to investigate mitigating evidence resulted in deficient performance."

45. Commonwealth v. Hackett, Sept. Term, 1986, Nos. 3396-3400 (Phila. C.P. Oct. 5, 2005) (Philadelphia, successor PCRA) (new trial granted under *Batson v. Kentucky* based upon newly discovered evidence of racial discrimination in jury selection; that evidence consisted of court finding in co-defendant's post-conviction proceedings in Commonwealth v. Spence, Sept. Term, 1986, Nos. 3391-3395 (Phila. C.P. March 22, 2004) that the prosecutor in their joint trial – who had prepared internal videotaped training program that explained how to discriminate in jury selection – had peremptorily stricken black jurors on the basis of race in this case).

46. Commonwealth v. Lee (Percy), May Term, 1986, Nos. 8605-1163, 1164, 1166 & 1168 (Phila. C.P. Sept. 21, 2005) (Philadelphia, PCRA remand/*Roper*) (death sentence imposed upon defendant who was age seventeen at time of offense vacated under *Roper v. Simmons* and life sentence imposed).

47. Cross v. Price, No. 95-614, 2005 WL 2106559, 2005 U.S. Dist. LEXIS 18510 (W.D. Pa. Aug. 30, 2005) (Beaver, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to request a curative instruction that Pennsylvania's life sentence carries no possibility of parole after the defendant told the sentencing jury that he would be eligible for parole from a life sentence after twenty years and, after serving back time on another offense, could be released to "get on with [his] life" after thirty-five years; counsel also ineffective for the predicate failure to properly prepare defendant for his penalty-phase testimony so as to avoid this "highly prejudicial" misstatement of state law).

48. Thomas (Brian) v. Beard, No. 2:00-cv-00803-LP, 388 F. Supp. 2d 489 (E.D. Pa. Aug. 19, 2005) (Philadelphia, habeas) (death sentence reversed for counsel's ineffectiveness in failing to investigate and present mental health mitigating evidence, including evidence of prior suicide attempts, pre-existing "repeated diagnoses of paranoid schizophrenia and an inability to control aggressive impulses," and personal background information; counsel also ineffective for providing a "grossly deficient" closing argument that "was, at best, incoherent"; petitioner's purported waiver of mitigation was invalid because it was not informed, where trial counsel had failed to conduct the predicate investigation necessary to explain to petitioner what mitigating evidence was available to him and neither trial counsel nor the court had adequately explained to him the nature of mitigating evidence in the penalty phase of a capital trial).

49. Baker (Lee) v. Horn, No. 2:96-CV-00037-AB, 383 F. Supp. 2d 720 (E.D. Pa. Aug. 15, 2005) (Philadelphia, habeas) (new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant; trial counsel was ineffective for failing to object to the erroneous instruction).

50. Rollins v. Horn, No. 2:00-CV-01288-JCJ, 2005 WL 1806504, 2005 U.S. Dist. LEXIS 15493 (E.D. Pa. July 29, 2005) (Philadelphia, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to investigate and present a range of mitigating evidence relating to the defendant's personal background and family history, child abuse, psychiatric diagnoses, and brain damage; new sentencing hearing also granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* and *Banks v. Horn* where jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

51. Laird v. Horn, 414 F.3d 419 (3d Cir. July 19, 2005) (Bucks, habeas appeal) (new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed

the specific intent to kill by permitting the jury to transfer the intent of his co-defendant), *cert. denied*, 126 S. Ct. 1143 (U.S. Jan. 17, 2006).

52. Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., June 29, 2005) (Philadelphia, PCRA) (new trial granted for ineffectiveness of counsel in failing to investigate and present a diminished capacity, voluntary intoxication, or heat of passion defense to reduce the degree of murder; Commonwealth had conceded entitlement to penalty-phase relief).

53. Commonwealth v. Ligons, May Term, 1998, No 0086 (Phila. C.P., Crim. Div., June 23, 2005) (Philadelphia, PCRA) (death sentence reversed for trial counsel's ineffectiveness in failing to investigate and present mitigating evidence from institutional records).

54. Rompilla v. Beard, 545 U.S. 374 (U.S. June 20, 2005) (Lehigh, habeas certiorari) (death sentence reversed for trial counsel's ineffectiveness in failing to review file of prior conviction that prosecution indicated it would rely upon in proving aggravating circumstance that the defendant had a significant history of prior convictions involving the use or threat of violence; no reasonable lawyer would fail to review file prosecution had indicated it would use as proof of its case and failure was prejudicial because it contained reference to broad range of mitigating evidence that counsel had failed to develop through other investigative efforts, including abusive childhood, alcoholism, mental retardation, fetal alcohol syndrome, possible schizophrenia, and red flags of brain damage, as well as leads to other institutional records containing additional mitigating evidence) (negotiated life plea).

55. Rivers v. Horn, No. 02-1600 (E.D. Pa. May 10, 2005) (Philadelphia, habeas) (stipulated grant of penalty-phase relief for ineffective assistance of counsel for failing to investigate and present mitigating evidence) (plea to life sentence).

56. Bronshtein v. Horn, Nos. 01-9004 & 01-9005, 404 F.3d 700 (3d Cir. Apr. 14, 2005) (Montgomery, habeas appeal) (death sentence reversed under *Simmons v. South Carolina* when court refused to instruct the jury as to parole ineligibility from a life sentence after the evidence and argument placed the defendant's future dangerousness in issue), *aff'g penalty-phase relief & rev'g guilt-phase relief in* 2001 WL 767593, 2001 U.S. Dist. LEXIS 9310 (E.D. Pa. July 5, 2001), *cert. denied*, No. 05-346, 546 U.S. 1208 (U.S. Feb. 21, 2006) and No. 05-7539, 546 U.S. 1209 (U.S. Feb. 21, 2006).

57. Blystone v. Horn, No. 99-CV-490, 2005 U.S. Dist. LEXIS 40922 (W.D. Pa. Mar. 31, 2005) (Fayette, habeas) (death sentence reversed for ineffectiveness of penalty-phase counsel for failing to investigate and present multiple categories of mitigating evidence; state court's determination that defendant had waived right to present mitigating evidence was an unreasonable application of federal constitutional law on multiple grounds)

* The court held that counsel was ineffective for failing to investigate and obtain a range of mental health mitigating evidence; this included a failure to investigate and obtain institutional records; failing to recognize "red flags" of brain damage and mental illness in the one competency evaluation that was performed; being ignorant of the law governing the right to the assistance of mental health experts, and consequently failing to seek the appointment of mental health experts;
* The court rejects the state court's holding that the expert testimony could not be credited because the experts did not evaluate the defendant until more than ten years after the trial; habeas court finds that had counsel obtained the assistance of mental health experts, those experts would have testified as did petitioner's state post-conviction experts that petitioner had brain damage and various mental health diagnoses, and would have concluded that petitioner was under extreme mental and emotional disturbance at the time of the offense and that his capacity to conform his conduct was significantly impaired;
* The court further finds that counsel was ineffective for failing to obtain petitioner's prior prison records, which contained evidence of favorable prison adjustment and lack of future dangerousness if sentenced to life.
* On the waiver question, the court held that petitioner did not adopt a strategy of acquittal or death, but that his statement to counsel that he did not want life imprisonment meant only that he wanted to present a defense to first degree murder; the court further held that what it described as petitioner "purported waiver" of mitigation was not knowing, intelligent, and voluntary because petitioner could not have knowingly waived the presentation of mitigation that counsel had neither investigated nor advised petitioner was available to be presented; moreover, petitioner's direction to counsel at the start of the penalty phase that he did not want his family to testify to beg for his life did not absolve counsel of the predicate duty to have conducted a thorough mitigation investigation and did not waive presentation of the mitigating evidence such an investigation would have uncovered.

58. Commonwealth v. Hughes (Kevin), Jan. Term, 1980, Nos. 1688-1690 & 1692 (Phila. C.P. Mar. 21, 2005) (Philadelphia, PCRA remand/*Roper*) (death sentence imposed upon defendant who was age sixteen years, eleven months, and 24 days at time of offense vacated under *Roper v. Simmons* and life sentence imposed).

59. Simmons v. Beard, No. 02-CV-161 J, 356 F. Supp. 2d 548 (W.D. Pa. Feb. 22, 2005) (Cambria, habeas) (new trial granted under *Brady v. Maryland* where habeas court "find[s] a consistent pattern of prosecutorial misconduct in the nature of withholding favorable evidence that could have been used to substantially impeach the testimony of the most pivotal prosecution witnesses," along with "additional suppressed evidence [that] could have been used to further weaken the prosecution's case")
* The court found that the prosecution "denied [the defendant] a fair trial by concealing evidence from the defense that raised serious questions concerning the credibility of the two key witnesses who formed the foundation of the prosecution's case

as well as physical evidence that would have further buttressed his claim of innocence. These failures were neither inadvertent nor isolated. Rather, the evidence reveals that the prosecution was well aware of its obligation to disclose and yet engaged in a deliberate pattern of concealment."

60. Commonwealth v. Collins (Rodney), Aug. Term, 1992, Nos. 1588-1590 (Phila. C.P. Feb. 16, 2005) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present available mitigating evidence).

61. Jacobs v. Horn, No. 01-9000, 395 F.3d 92 (3d Cir. Jan 20, 2005) (York, habeas appeal, new trial) (counsel ineffective for presenting diminished capacity defense without investigating and presenting available evidence of the defendant's mental retardation, brain damage, and schizoid personality disorder; that as a child he was a witness to and victim of abuse and neglect; that he suffered from drug and alcohol abuse; that he had serious cognitive and emotional impairments; and that as a result of all these factors he may have lacked the capacity to formulate the specific intent to kill), *cert. denied*, 546 U.S. 962 (U.S. Oct. 17, 2005).

62. Commonwealth v. Small, No. 2844 CA 1995 (York C.P., Crim. Div., Dec. 16, 2004) (York, PCRA, new trial) (trial counsel was ineffective in failing to interview and make reasonable efforts to locate and present two material witnesses who would have testified that a key prosecution witness had confessed to killing the victim; counsel was ineffective and suffered from a conflict of interest when, as a result of his prior representation of a prosecution witness, he was aware that the witness had made a contemporaneous statement to the police that had not linked the defendant to the offense, but because he obtained that information confidentially, did not cross-examine the witness about his failure to contemporaneously implicate the defendant; counsel also was ineffective in failing to assert the marital privilege to bar the prosecution from eliciting testimony of a highly damaging alleged admission by the defendant to his wife).

- Commonwealth v. Gibson (Jerome), Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. Nov. 26, 2004) (Bucks, PCRA remand/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

- Commonwealth v. Peoples, Oct. Term, 1989, Nos. 4498-4502 (Phila. C.P., Crim. Div., Nov. 23, 2004) (Philadelphia, PCRA) (stipulated relief for ineffective assistance of counsel in failing to investigate and present available mitigating evidence).

63. Commonwealth v. Moore, Nos. 316, 317 Cap. App. Dkt., 580 Pa. 279, 860 A.2d 88 (Pa. Oct. 21, 2004) (Luzerne, PCRA appeal) (death sentenced overturned on claim of layered ineffectiveness of counsel; appellate counsel was ineffective for failing to properly litigating claim of trial counsel's predicate ineffectiveness for failing to investigate and present available mitigating evidence)

* trial counsel failed to interview defendant's mother, explain to her the nature of the penalty phase and the significance of her potential testimony, or to subpoena her attendance for the penalty phase; failed to subpoena Moore's sister, and although she was present at trial, did not approach her until a recess during the guilt phase on the final day of trial, and never told her either that she might be needed to testify or that the penalty phase would start the next day; subpoenaed Moore's ex-wife for alibi testimony that she refused to present at the guilt phase, but never spoke with her about the penalty phase, at which she would have been willing to testify.
* the Court approvingly cited the PCRA court's observations that counsel could have "presented [mitigating evidence] during the penalty phase which would have established for consideration by the jury, that Moore's life was traumatic, abusive, neglectful, cruel, and harmful to his emotional development. The record established Moore was abused by his alcoholic father, he witnessed his mother receive beatings and when he attempted to protect his mother as a young child, he himself was beaten. He witnessed his father slash his mother's throat and after this event he lived in fear and became withdrawn. Testimony also revealed Moore was neglected and he had various physical ailments that were not cared for. It was evident from the testimony presented that Moore's childhood was one of constant trauma, fear, and terror. Clearly, this [c]ourt finds this type of evidence constitutes mitigating evidence and further finds it should have been presented to the jury and not having done so was prejudicial to Moore. Obviously, this is the type of evidence that demonstrates a reasonable probability that a different result could have occurred at Moore's capital penalty phase trial."
(life sentence imposed after prosecution declines to seek death on resentencing; habeas pending on underlying conviction)

- Rolan v. Vaughn, No. 01-CV-81, 2004 WL 2297407, 2004 U.S. Dist. LEXIS 20554 (E.D. Pa. Oct. 13, 2004) (Philadelphia, habeas) (new trial granted for trial counsel's ineffectiveness in failing to interview and present eyewitness in support of claim of self-defense; this failure was prejudicial because the unpresented eyewitness would have contradicted several critical portions of the testimony of the Commonwealth's lead witness, whose credibility was already suspect because he was related to the victim and had been offered a deal by the prosecution; defendant's claim of self-defense was further supported jury mitigation finding at his capital resentencing hearing, where this evidence had been presented, that the defendant had acted under extreme duress), *aff'd*, — F.3d —, 2006 WL 997383 (3d Cir. Apr. 18, 2006).

64. Commonwealth v. Fisher (Jonathan), No. 4631-99 (Mtgy. C.P. Aug. 6, 2004) (Montgomery, PCRA) (stipulated penalty phase relief for counsel's ineffectiveness in failing to investigate and present mitigating evidence; resentenced to life, with agreement to permit continuation of guilt-stage appeals).

- Commonwealth v. Cooper, Aug. Term, 2002, No. 840 1/1 (Phila. C.P. June 14, 2004) (Philadelphia, post-trial motions) (death sentence overturned for penalty-phase ineffectiveness of counsel).

65. Commonwealth v. Thompson (Andre), Feb. Term, 1993, Nos. 2193-2200 (Phila. C.P. June 1, 2004) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to investigate and present alibi defense and in failing to investigate and challenge questionable eyewitness identification) (plea to third-degree murder; resentenced to term of 19-40 years).

66. Commonwealth v. Thompson (Louis), Nos. 3607-3612, April Term 1990 (Phila. C.P. May 21, 2004) (Philadelphia, PCRA) (stipulation to vacation of death sentence in exchange for waiver of guilt-phase appeals; life sentence entered).

- Commonwealth v. Pirela, Jan. Term, 1983, No. 2143 (Phila. C.P. Apr. 30, 2004) (Philadelphia, successor PCRA/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

67. Commonwealth v. Walker, May Term, 1991, Nos. 2770-2776, bench order (Phila. C.P. Apr. 21, 2004) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

- Wilson (Zachary) v. Beard, No. 02-CV-374, 314 F. Supp. 2d 434 (E.D. Pa. Apr. 19, 2004) (Philadelphia, habeas) (homicide convictions that were used as evidence of aggravating circumstances in capital case that resulted in death sentence vacated and new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race; district court finds that videotape establishes both *prima facie* case of *Batson* violation and potential race-neutral explanations, but finds that with unavailability of voir dire transcripts and prosecutor's admission that he did not remember the basis for his strikes, the Commonwealth failed to prove that he had a mixed motive other than race for striking at least nine African-American jurors while empaneling a jury of ten whites and two African Americans).

68. Commonwealth v. Spence, Sept. Term, 1986, Nos. 3391-3395 (Phila. C.P. March 22, 2004) (Philadelphia, PCRA, new trial) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race) (resentenced to a term of 22-1/2 to 45 years).

69. Commonwealth v. Martin, No. 93-10899 (Leb. C.P. March 4, 2004) (Lebanon, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to

investigate and present mental health mitigating evidence, including record of diagnosis of chronic post-traumatic stress disorder arising out of sexual abuse by uncle that mother had obtained from mental health provider and provided to counsel prior to the penalty phase; investigation of institutional records would have disclosed that treatment facility in which defendant had been an in-patient for more than two years had been shut down by Commonwealth of Virginia for abusing patients, and that abuse experienced by defendant in this facility was an additional cause of his PTSD; mental health evaluation would have revealed that defendant suffered from depression as well from PTSD, had significant impairments in his capacity to conform his conduct to the requirements of law, and had committed the offense while under an extreme mental or emotional disturbance).

70. Holloway v. Horn, 355 F.3d 707 (3d Cir. Jan. 22, 2004) (Philadelphia, habeas appeal, new trial) (new trial granted under *Batson v. Kentucky* when prosecutor engaged in pattern of striking black jurors and failed to provide genuine race-neutral explanation; proffered explanation that stricken juror was not just black, but male and about defendant's age held pretextual where three white jurors who were empaneled -- two male and one female -- were approximately the defendant's age, as were four other white jurors whom the prosecution had accepted; Pennsylvania court's requirement that the defense establish the race of all jurors was contrary to federal law) (entered plea to third-degree murder on resentencing, released on parole).

71. Commonwealth v. Graham, Aug. Term, 1987, Nos. 3948 *et seq.* (Phila. C.P. Dec. 18, 2003) (Philadelphia, PCRA/*Atkins*) (as a result of defendant's mental retardation, six death sentence vacated under *Atkins v. Virginia* and six consecutive life sentence imposed).

72. Commonwealth v. Griffin, No. 1655-84 (Del. C.P., Crim. Div. Dec. 16, 2003) (Delaware, PCRA) (negotiated settlement for life sentence based upon information leading to the successful prosecution of person who ordered the killing in this case).

73. Commonwealth v. Gease, No. 902 of 1994 (Del. C.P. Nov. 14, 2003) (Delaware, PCRA) (stipulation to penalty-phase relief for ineffectiveness of trial counsel in failing to investigate and present mitigating evidence; negotiated life sentence).

- Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003) (Lehigh, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence of defendant's "mental problems," including diagnoses of post-traumatic stress disorder, depression, adjustment disorder, and dysthemic disorder; while there was a factual dispute as to the PTSD diagnosis, "it is reasonably probable that the [other diagnoses] would have been sufficient to present a mitigating factor, even if the jury did not credit the diagnosis of PTSD"; penalty-phase relief also granted when trial court improperly prevented defense psychologist from presenting relevant mitigating evidence in the form of expert mental

health testimony that the defendant would not pose a future danger if he received a life sentence; court also holds that defendant was denied the proportionality review that was mandated at the time of his appeal when the Lehigh County court erroneously informed the Administrative Office of Pennsylvania Courts that Williams' jury had found one aggravating circumstance and no mitigating circumstances – sentencing jury had in fact found one mitigating circumstance; PCRA court ordered clerk to provide correct information to AOPC to permit new proportionality review, if necessary), *rev'd and remanded*, Nos. 430, 431 Cap. App. Dkt., *slip order* (Pa. June 19, 2006) (per curiam), *relief reinstated* Commonwealth v. Williams (Kenneth), No. CR-981-1984 (Lehigh C.P. Oct. 17, 2003).

74. Kindler v. Horn, 291 F. Supp. 2d 323 (E.D. Pa. Sept. 22, 2003) (Philadelphia, habeas) (new sentencing hearing granted for prosecutorial misconduct and under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance; "blatant" prosecutorial misconduct found in sentencing phase where prosecutor improperly vouched for death penalty by stating that he would "argue and present both of the sides" with respect to co-defendant "but I felt from the outset here that I would let you know that the urging [for death] would be done based on the evidence would be against [defendant]"; "By contrasting Petitioner with his co-defendant and arguing in favor of the death penalty as to him alone, it further appears that the goal of the prosecutor was to use Mr. Kindler as a 'sacrificial lamb' in order to secure at least one death penalty conviction.").

75. Commonwealth v. Yarris, No. 690/82 (Del. C.P. Sept. 3, 2003) (Delaware, successor PCRA/DNA exoneration) (new trial granted following joint petition for post-conviction relief based upon DNA evidence excluding Mr. Yarris as source of semen, blood, and skin-cell DNA in this rape-murder; semen and skin-cell DNA was from same person, and it was neither Mr. Yarris nor the victim's husband) (prosecution dropped charges; defendant released from prison).

76. Commonwealth v. Scott, No. 1739-98 (Mtgy. C.P.) (June 30, 2003) (Montgomery, PCRA/*Atkins*) (as a result of defendant's mental retardation, death sentence vacated under *Atkins v. Virginia* and life sentence imposed).

77. Porter v. Horn, 276 F. Supp. 2d 278 (E.D. Pa. June 26, 2003) (Philadelphia, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Banks v. Horn*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

78. Commonwealth v. Ockenhouse, No. 1664/1998 (Lehigh C.P. Apr. 16, 2003) (Lehigh, PCRA) (stipulated vacation of death sentence; plea to life sentence).

- Wallace v. Price, 265 F. Supp. 2d 545 (W.D. Pa. Mar. 31, 2003) (*Wallace II*) (Washington, habeas corpus - adopting magistrate's report and recommendation) (new trial granted for violation of Confrontation Clause and due process right to present a defense where trial court refused to permit defense to present statement by Commonwealth's star witness confessing that he, and not Wallace, had shot the victim, or to cross-examine that witness with this statement).

- Commonwealth v. Clark, Dec. Term, 1993, Nos. 4115-19 (Phila. C.P. March 17, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

79. Commonwealth v. Cook, Aug. Term, 1987, No. 2651 2/2 (Phila. C.P. March 13, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

80. Commonwealth v. Keaton, March Term, 1993, No. 1925 (Phila. C.P. March 10, 2003), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence).

81. Commonwealth v. Pelzer, Oct. Term, 1988, Nos. 3200, 3199, 3197, 3194 & 3205 (Phila. C.P. Jan. 29, 2003), bench order (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to adequately challenge the testimony of the Commonwealth's forensic pathologist and for failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability) (co-defendant of Henry Daniels).

82. Commonwealth v. Daniels, Oct. Term, 1988, Nos. 3175, 3178, 3181-82, 3187 & 3189 (Phila. C.P. Jan. 29, 2003), bench order (Phila. C.P. Jan. 29, 2003) (Philadelphia, PCRA) (new trial granted for counsel's ineffectiveness in failing to adequately challenge the testimony of the Commonwealth's forensic pathologist and for failing to object under *Commonwealth v. Huffman* to an erroneous instruction on accomplice and conspiracy liability) (co-defendant of Kevin Pelzer).

83. Commonwealth v. Wilson (Harold), July Term, 1988, Nos. 3267-3273 (Phila. C.P. Jan. 17, 2003) (*Wilson II*), bench order (Philadelphia, PCRA remand) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race, presented pretextual race-neutral explanations for those strikes, and accepted white jurors whose characteristics were similar to blacks jurors whom he had stricken) (acquitted of all charges on retrial).

84. Commonwealth v. Proctor, No. 1985-759 (Crawford C.P. Dec. 30, 2002) (Crawford, successor PCRA) (penalty-phase relief under *Brady v. Maryland* for Commonwealth's failure to disclose five separate items of evidence that were material to the jury's consideration of aggravating and mitigating evidence, including a knife found outside the murder scene shortly after the murder that was a potential murder weapon; the coroner's provisional report that there may have been two murder weapons, including a knife; a police drawing of a bloody shoe print found on the carpet near the victim that was several inches smaller than the defendant's shoe size; and statements made by the defendant's girlfriend and codefendant before the murder that the eventual victim might have to be killed so that he could not identify her and made afterwards that she had killed someone) (entered plea to life).

85. Copenhefer v. Horn, No. 99-5E (W.D. Pa. Dec. 9, 2002) (Erie, habeas corpus) (adopting magistrate's report; death sentence reversed where prosecution had stipulated to the defendant's lack of criminal record but jury failed to find mitigating circumstance that the defendant had no significant history of convictions; jury's failure to give mitigating effect to a proven mitigating circumstance violated the fundamental Eighth Amendment requirement that a capital sentencer may not refuse to consider and give mitigating effect to relevant mitigating evidence).

86. Commonwealth v. Ford, No. 248 Cap. App. Dkt., 570 Pa. 378, 809 A.2d 325 (Pa. Oct. 24, 2002) (Philadelphia, PCRA appeal) (death sentence reversed as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including defendant's history of abuse, mental illness, and dysfunction; first time the Pennsylvania Supreme Court has granted post-conviction relief for failure to present mitigating evidence), *cert. denied*, 540 U.S. 1150 (U.S. Jan. 20, 2004) (stipulation to life sentence on remand for resentencing).

- Wallace v. Price, No. 2:99-CV-231, 2002 WL 31180963, 2002 U.S. Dist. LEXIS 19973 (W.D. Pa. Oct. 1, 2002) (*Wallace II*) (Washington, habeas corpus - magistrate's report and recommendation) (see above).

87. Commonwealth v. Chambers (Karl), 570 Pa. 3, 807 A.2d 872 (Pa. Sept. 26, 2002) (*Chambers II*) (York, PCRA appeal) (death sentence reversed under *Mills v. Maryland* where trial court instructed the jury that "all of you must at least find one mitigating circumstance" before the jury could weigh mitigating evidence against aggravating evidence; "while a single juror in this Commonwealth can prevent a death sentence, a single juror can never compel a death sentence"; trial counsel ineffective for failing to object to this erroneous instruction) (life sentence imposed per *Atkins v. Virginia* prior to sentencing retrial).

88. Commonwealth v. Karenbauer, No. 642 of 1995 (Lawr. C.P. Sept. 23, 2002) (Lawrence, PCRA/*Atkins*) (PCRA court accepts agreement of counsel that defendant is mentally retarded, vacates death sentence under *Atkins v. Virginia*, and imposes life sentence; defendant permitted to proceed with post-conviction challenges to conviction. The defense had presented expert testimony at trial that defendant was moderately mentally retarded; prosecution accepted evidence of retardation, but argued that Karenbauer was only *mildly* mentally retarded; jury found mild mental retardation as a mitigating circumstance).

89. Commonwealth v. Harris, Sept. Term, 1992, No. 342-352 (Phila. C.P. Sept. 12, 2002), bench order (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence) (stipulation to life sentence on resentencing).

- Copenhefer v. Horn, No. 99-5E (W.D. Pa. Aug. 15, 2002) (Erie, habeas corpus - magistrate's report and recommendation) (see above).

90. Faulkner v. Horn, No. 99 - 5986 (E.D. Pa. July 9, 2002), stipulation and order (Montgomery, habeas corpus, new trial) (district court approves parties' stipulation to grant habeas relief to facilitate negotiated plea agreement under *Atkins v. Virginia*; relief granted on petitioner's claims that, as a combined result of trial error and trial counsel's failure to investigate defendant's history of mental illness -- including institutional diagnosis of paranoid schizophrenia -- defendant was prevented from presenting a voluntary manslaughter defense to first degree murder and psychiatric testimony that would have supported that defense) (life plea accepted).

91. Carpenter v. Vaughn, 296 F.3d 138 (3d Cir. July 1, 2002) (York, habeas corpus appeal) (Circuit panel unanimously holds that trial counsel was ineffective for failing to object to the trial court's prejudicially inaccurate response to the jury's inquiry as to whether it could "recommend life imprisonment with a guarantee of no parole"; although a defendant who is sentenced to life imprisonment is statutorily ineligible for parole under Pennsylvania law, defense counsel failed to object or to request a clarifying instruction after the trial court instead responded "no, absolutely not. . . . And the question of parole is absolutely irrelevant. I hope you understand that.") (life plea accepted).

92. Commonwealth v. Craver, No. 1902-93 (Del. C.P., Crim. Div. June 21, 2002) (Delaware, PCRA) (death sentence overturned as a result of trial counsel's ineffectiveness for failing to investigate and present mental health mitigating evidence, including an extensive history of mental health problems and prior institutionalizations that included military records documenting Craver's discharge from the service because of psychiatric problems, and court records and testimony from a 1978 prosecution for an assault in Ohio in which he was found not guilty by reason of insanity) (life plea accepted).

93. Commonwealth v. Thomas, Feb. Term, 1994, Nos. 991-992 (Phila. C.P. May 31, 2002), bench order (Philadelphia, PCRA) (new trial ordered where police and prosecutorial misconduct denied defendant a fair trial; court stated from the bench: "if the jury knew what I knew about the case, and knew what I knew about [the officer in question] or what everybody knows now, no way, in my opinion, would they not find a reasonable doubt in this case") (defendant died during pendency of Commonwealth appeal). Claims included:
* a failure to disclose a pattern of misconduct by a corrupt police officer later convicted of other charges of official misconduct;
* police intimidated eyewitnesses who had exculpatory information, suppressing information that eyewitnesses had identified other suspects and excluded the defendant as participating in the killing;
* the corrupt officer procured false testimony, later recanted, from two "eyewitnesses";
* the prosecution failed to disclose that its "star" prosecution witnesses were provided financial and housing assistance.

- Commonwealth v. Gibson, Nos. 5119, 5119-001/1994 (Bucks C.P., Crim. Div. May 22, 2002) (Bucks, PCRA) (death sentence overturned as a result of counsel's ineffectiveness for failing to investigate and present mitigating evidence of petitioner's brain damage; PCRA court rejects defense counsel's explanation of his failure to obtain brain scan to reveal organic brain damage "because that was very expensive" as constituting deficient performance, writing that "Obviously, when addressing the imposition of a death penalty, expense cannot be a factor") (appeal remanded to Court of Common Pleas under *Atkins* for determination of mental retardation).

94. Henry v. Horn, 218 F. Supp. 2d 671 (E.D. Pa. May 16, 2002) (Northampton, habeas corpus) (habeas court grants petitioner's motion for summary judgment under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* that jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance) (on remand, negotiated life sentence imposed).

- Commonwealth v. Collins (Ronald), May Term, 1992, Nos. 2253-2256, June Term, Nos. 1477-1486 (Phila. C.P. Mar. 7, 2002) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence of family physical and psychological abuse, neglect, and abandonment; near-fatal head injury and brain damage; placement in special education; and mental and emotional disturbance), *aff'd*, 888 A.2d 564 (Pa. Dec. 27, 2005).

95. Commonwealth v. McNair, Dec. Term, 1987, No. 2459-2463 (Phila. C.P. Feb. 19, 2002) (Philadelphia, PCRA) (death sentence reversed for sentencing-stage counsel's ineffectiveness in failing to investigate and present available family background and mental health mitigating evidence) (life plea accepted).

96. Pursell v. Horn, 187 F. Supp. 2d 260 (W.D. Pa. Feb 1, 2002) (Erie, habeas corpus) (habeas court grants new sentencing hearing for trial counsel's ineffectiveness for failing to investigate, develop, and present what the court describes as "overwhelming amounts of mitigating evidence" concerning petitioner's childhood abuse and neglect, psychological problems, mental deficiencies, and general good character; trial court's instruction on torture aggravating circumstance, defining torture as a murder committed in a manner that is "especially heinous, atrocious, or cruel, manifesting exceptional depravity" was unconstitutionally vague and overbroad, in violation of *Godfrey v. Georgia* and the Eighth Amendment) (negotiated life plea).

●® Commonwealth v. Sneed, June Term, 1984, Nos. 674-676 (Phila. C.P. Jan. 4, 2002) (Philadelphia, PCRA) (new trial granted under *Batson v. Kentucky* as a result of prosecution's racial discrimination in jury selection; court also reached sentencing-stage issues and overturned death sentence for trial counsel's ineffectiveness in failing to investigate and present family background and mental health mitigating evidence), *aff'd in part (penalty relief) and rev'd in part (new trial) on procedural grounds*, 2006 WL 1675198 (Pa. June 19, 2006).

97. Commonwealth v. Basemore, March Term, 1987, Nos. 1762, 1763, 1764, 1765 (Phila. C.P. Dec. 19, 2001) (Philadelphia, PCRA) (new trial granted under *Batson v. Kentucky* when prosecutor who had prepared internal videotaped training program that explained how to discriminate in jury selection was found to have peremptorily stricken black jurors on the basis of race; PCRA court found that the jury selection practices "manifested a conscious pattern of discrimination and denied defendant equal protection of the law. . . . From the evidence before it, this Court is convinced that the trial prosecutor in this case engaged in a pattern of discriminating during voir dire. The record indicates a conscious strategy to exclude African-American jurors.") (jury retrial; resentenced to life by operation of law following failure to reach unanimous sentencing verdict).

98. Abu-Jamal v. Horn, 2001 WL 1609690, 2001 U.S. Dist. LEXIS 20812 (E.D. Pa. Dec. 18, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance).

99. Szuchon v. Lehman, 273 F.3d 299 (3d Cir. Nov 20, 2001) (Erie, habeas corpus appeal) (new sentencing hearing under *Witherspoon v. Witt* where trial court's excusal of juror for sentencing-stage bias, based upon statement that juror did not believe in capital punishment, was not supported by the evidence; prosecution never inquired whether juror could set aside generalized opposition to death penalty and follow the law, and thus failed to meet its burden of proving that the juror's ability to follow the law was substantially

impaired) (jury resentencing; resentenced to life by operation of law following jury's failure to reach a unanimous sentencing verdict).

100. Peterkin v. Horn, 176 F. Supp. 2d 342 (E.D. Pa. Nov. 6, 2001) (Philadelphia, habeas corpus) (new trial for numerous instances of prosecutorial misconduct, Confrontation Clause violation, insufficiency of the properly admitted evidence to prove robbery (the underlying aggravating circumstance), and ineffectiveness of counsel for failing to object to a variety of errors; death sentence also overturned for various incidents of prosecutorial misconduct and for trial counsel's ineffectiveness for failing to investigate and present available mitigating evidence) (life plea accepted).
* new trial granted in part because the prosecution had improperly presented, and the trial court improperly admitted, prejudicial hearsay testimony
* trial prosecutor committed misconduct by improperly presenting evidence of uncharged crimes and then intentionally misused this evidence in his closing argument; when all of this improper testimony and argument was removed from the case, the District Court found that the remaining properly admitted evidence was insufficient to support the jury's guilty verdict on the accompanying robbery charge, without which there were no aggravating circumstances in the case, and the case could not have advanced to the penalty phase of trial
* prosecutor committed misconduct by introducing evidence of uncharged crimes and referring to these crimes in closing argument: prosecution introduced evidence that defendant was also known by another name and was registered to vote under both names, that defendant was receiving welfare payments at another address that was a vacant lot, and affirmatively argued to the jury that defendant had committed welfare fraud
* prosecution improperly commented on defendant's silence by stating that "the same man that gave the address to a vacant lot . . . to get Public Assistance . . . sits there today, calmly in a suit, passive and cool, protected by the laws of the Commonwealth, protected by the laws encompassed in the Bill of Rights. . . . Oh yes, he is passive here now but the destruction that he wreaked, or visited on two human beings in a civilized society, I hope we can't tolerate this."
* prosecutor committed misconduct by arguing beyond the admissible scope of the evidence: prosecutor argued hearsay testimony that had been admitted for the limited purpose of proving the witness' state of mind as substantive evidence of how the homicide occurred; state court determination of harmless error failed to take into account the cumulative effect of all improperly admitted evidence
* Confrontation Clause violated when the trial court improperly admitted the hearsay testimony of two different prosecution witnesses of the victim's alleged statements that defendant "was in the [gas] station attendant's booth with a gun and the dial to the safe": the prosecution asked one of the witnesses about these remarks three separate times during direct examination with only a single cautionary instruction, the prosecutor inaccurately referred to the statement as substantive evidence in both his opening statement and closing argument, and the prosecutor again presented the statement during the sentencing phase of the trial

* improperly admitted hearsay testimony that provided "circumstantial evidence going to show the motive for the crime" was not harmless when considered in connection with (1) other inadmissible testimony that another witness saw the defendant in possession of a gun other than the murder weapon two days before the murders took place, and (2) inflammatory prosecutorial argument exhorting the jury to "be as cold and ruthless as the appellant was when he murdered his victims"
* death sentence reversed for prosecutorial misconduct where prosecutor argued that "[m]ercy has no part in your deliberation" – "the suggestion that mercy is inappropriate is . . . a misrepresentation of the law [that] withdraws from the jury one of the most central sentencing considerations, the one most likely to tilt the decision in favor of life" and "while the prosecutor may argue that mercy is not warranted by the facts of a certain case and the history of a particular defendant, when the prosecutor argues that it is mercy itself that is inappropriate, the jury is improperly told that the concept of mercy . . . [is] illegitimate"
* death sentence reversed for prosecutorial misconduct where prosecutor "improperly opined as to what the testimony of his best witnesses, the victims, would have been if they had lived"
* death sentence reversed for misconduct where prosecutor incorporated into the sentencing hearsay testimony that had been admitted at the guilt-stage in violation of the Confrontation Clause of the Sixth Amendment, and presented substantive circumstantial argument of how the homicide occurred based upon hearsay testimony that had been admissible at trial only for the limited purpose of proving the witness' state of mind
* trial counsel ineffective for failing to object to those portions of the prosecutor's closing arguments that the district court found improper, and appellate counsel was ineffective for failing to raise those issues on direct appeal
* given insufficiency of evidence of robbery, court found evidence insufficient to support the aggravating circumstance that the defendant had committed the killing during the perpetration of a felony (the purported robbery)
* death sentence also overturned for trial counsel's ineffectiveness in failing to investigate and present available mitigating evidence

101. Jermyn v. Horn, 266 F.3d 257 (3d Cir. Sept. 21, 2001) (Cumberland, habeas corpus appeal) (Circuit Court reverses death sentence as a result of trial counsel's ineffectiveness in failing to investigate and present mitigating evidence of extreme child abuse and neglect, the psychological implications of that abuse, and the victim's failure to protect the defendant from the abuse; court finds Pennsylvania Supreme Court's denial of relief an unreasonable application of *Strickland v. Washington*, and determines that "there is a reasonable probability that the presentation of the specific and disturbing evidence of childhood abuse and neglect as a mitigating factor would have convinced one juror to find the mitigating factors to outweigh the single aggravating factor the Commonwealth relied upon"), *reh'g denied* Jan. 4, 2002 (resentenced to life).

- Laird v. Horn, 159 F. Supp. 2d 58 (E.D. Pa. Sept. 5, 2001) (Bucks, habeas corpus) (new trial granted because of failure to provide specific intent instruction; death penalty overturned on numerous grounds), *aff'd*, 414 F.3d 419 (3d Cir. July 19, 2005)
  * new trial granted because guilt-stage jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant;
  * death sentence overturned on numerous grounds, including trial counsel's gross ineffectiveness in failing to investigate and present mitigating evidence of Mr. Laird's childhood, personal background, brain damage, and mental health that the court described as "too extensive to recount in its entirety";
  * new sentencing mandated because court's acquiescence in sheriff's decision to shackle defendant during penalty phase, which forced him to wear shackles and handcuffs in front of the jury, violated due process and the defendant's right to a fair and reliable capital sentencing hearing;
  * new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer* because jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance;
  * death sentence also reversed because the prosecutor's statement in closing that the defendants had "shed not one tear, not one tear. They have not shown one drop of remorse for what they have done, not now. Even now. Even now. . ." constituted impermissible comment on the defendant's exercise of his right not to testify.
  * Court finds that "the language used by the prosecutor was of such a character that the jury would necessarily consider it to be a comment on the defendant's failure to testify at sentencing and apologize for his crime"; while the defendant's demeanor may be a relevant factors at sentencing, "the comments in this case were not mere comments on petitioner's demeanor"
  * While the improper comments, in isolation, did not "so infect[ ] the trial that petitioner was denied due process," they "contributed to the fundamental unfairness of petitioner's sentencing hearing" when considered together with the other penalty phase errors.

- Holloway v. Horn, 161 F. Supp. 2d 452 (E.D. Pa. Aug 27, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including denial of right to present expert mental health testimony under *Ake v. Oklahoma*), *denial of guilt-stage relief rev'd*, 355 F.3d 707 (3d Cir. Jan. 22, 2004), *cert. denied*, 543 U.S. 976 (U.S. Nov. 1, 2004).

102. Commonwealth v. Counterman, No. 2500 of 1988 (Lehigh C.P. Aug. 27, 2001) (Lehigh, PCRA) (new trial granted on multiple grounds; death penalty vacated for sentencing counsel's ineffectiveness for failing to investigate and present mitigating evidence) (pled to lesser charges and released).

* new trial granted for combination of police and prosecutorial suppression of exculpatory evidence by police and prosecutors
* the *Brady* violation consisted in part of on-going police and prosecutorial suppression in this arson-murder cases of the fact that the defendant's son (who was killed in the fire) had a history of starting fires and that prosecutors had initially suppressed and then whited-out a portion of the original statement given by petitioner's mentally retarded wife that she had awakened Counterman to tell him that the house was on fire -- after the police and prosecution had denied during PCRA proceedings that they had any information on the son's fire starting, the defense found *in the police files* a statement from Children & Youth Services concerning the son's history of fire setting;
* PCRA court writes: "[T]he District Attorney is a constitutional officer and is charged to act under the highest ethical duty. He acts not just as an advocate for one side. His is the responsibility to disclose freely and willingly any evidence favorable to the Defendant and to prosecute vigorously to a fair and just disposition."
* new trial also granted as a result of trial counsel's ineffective assistance for failing to investigate this exculpatory evidence;
* new trial granted for counsel's ineffectiveness in failing to investigate and present available character evidence at trial;
* court also reached sentencing-stage issues and overturned death sentence on the grounds that defense counsel had been ineffective in failing to investigate and present available mitigating evidence.

●® Bronshtein v. Horn, 2001 WL 767593, 2001 U.S. Dist. LEXIS 9310 (E.D. Pa. July 5, 2001) (Montgomery, habeas corpus) (new trial granted because jury instruction on accomplice liability improperly diminished the prosecution's burden of proving beyond a reasonable doubt that defendant possessed the specific intent to kill by permitting the jury to transfer the intent of his co-defendant; the court also granted a new sentencing hearing on multiple grounds), *penalty-phase relief aff'd, guilt-phase relief rev'd*, Nos. 01-9004 & 01-9005 (3d Cir. Apr. 14, 2005), *cert. denied*, No. 05-346, 2006 WL 386261 (U.S. Feb. 21, 2006) and No. 05-7539, 2006 WL 386262 (U.S. Feb. 21, 2006).
* death sentence reversed under *Simmons v. South Carolina* because the trial court had improperly failed to instruct the jury that its life sentence carried with it no possibility of parole after the prosecution had injected the issue of future dangerousness: court finds cross-examination of mental health expert on negative character traits, reference to repeated anti-social acts by petitioner, commenting on the supposed "snowball effect" of untreated anti-social conduct, and comment about petitioner's supposed inability to "play by the rules in a civilized society" were "unquestionably designed to evoke in a reasonable juror's mind the potential danger he would pose to society in the event of his release on parole"
* new sentencing hearing also required because the trial court failed to instruct the jury on all the elements of aggravating circumstance 42 Pa. C.S. § 9711(d)(6), that "the defendant had committed the killing during the perpetration of a felony": the jury was never told that Pennsylvania law limited the murder-during-another-felony aggravating circumstance

to defendants who actually committed the killing, *Commonwealth v. Lassiter*, and the jury's mitigation finding by a preponderance of the evidence that Bronshtein might not have been the shooter precluded a finding beyond a reasonable doubt that he had been the shooter
* court finds that in a weighing state such as Pennsylvania, the jury's consideration of an invalid aggravating circumstance is Eighth Amendment error

103. Commonwealth v. Reyes, No 1388-93 (Del. C.P. July 2, 2001) (Delaware, PCRA) (new sentencing hearing for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

®○ Hardcastle v. Horn, 2001 WL 722781, 2001 U.S. Dist. LEXIS 8556 (E.D. Pa. June 27, 2001) (Philadelphia, habeas corpus) (new trial granted under *Batson v. Kentucky* as a result of prosecution's racial discrimination in jury selection; court found that trial prosecutor had exercised peremptory challenges to intentionally discriminate against six African-American jurors; state court decision that *sua sponte* attributed race-neutral reasons to the strikes based upon the voir dire transcripts was an unreasonable application of *Batson*, which requires that the prosecution provide actual, not apparent, reasons for each strike; state supreme court decision also involved an unreasonable determination of fact where court created race-neutral explanation for striking juror who was actually white and failed to provide any explanation for strikes of two black jurors), *vacated in part and remanded by* 368 F.3d 246 (3d Cir. May 11, 2004), *cert. denied*, 543 U.S. 1081 (U.S. Jan. 10, 2005), *relief granted on remand*, 2007 U.S. Dist. LEXIS 78073 (E.D. Pa. Oct. 19, 2007).

104. Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491 (Phila. C.P. June 12, 2001) (*Jones II*) (Philadelphia, PCRA) (new sentencing hearing for ineffective assistance of counsel for failing to investigate and present family background, brain damage, and mental health mitigating evidence; presentation of defense psychiatrist at sentencing who had never been provided any background records or even interviewed the defendant violated the right to mental health assistance in the preparation and presentation of the defense at sentencing).

105. Appel v. Horn, 250 F.3d 203 (3d Cir. May 3, 2001) (Northampton, habeas corpus appeal) (new trial granted for constructive denial of counsel under *United States v. Cronic* where state courts mischaracterized and adjudicated claim as a legally distinct claim of ineffective assistance of stand-by counsel under *Strickland v. Washington*; defendant had been denied right to counsel in pre-trial competency proceedings where court scheduled hearing to determine whether defendant was competent to waive right to appointed counsel after defendant had indicated that he wanted to represent himself, plead guilty, and accept death penalty; appointed counsel failed to obtain any mental health records or interview available lay witnesses, which would have disclosed defendant's history of psychotic mental illness, and failed to present any case at all at the competency

proceeding, effectively denying Appel counsel at this critical stage of trial) (pled to life sentence).

- Holland v. Horn, 150 F. Supp. 2d 706 (E.D. Pa. Apr. 25, 2001) (Philadelphia, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present mitigating evidence, including denial of right to present expert mental health testimony under *Ake v. Oklahoma*).

- Jacobs v. Horn, 129 F. Supp. 2d 390 (M.D. Pa. Feb. 20, 2001) (York, habeas corpus) (new sentencing hearing granted as a result of trial counsel's ineffectiveness for failing to investigate and present extensive mitigating evidence including extreme mental and emotional disturbance, mental retardation, brain damage, schizoid personality disorder, dysthymia, serious childhood abuse, trauma, and neglect, and history of alcohol and drug abuse), *denial of new trial rev'd*, 395 F.3d 92 (3d Cir. Jan 20, 2005), *cert. denied*, 126 S. Ct. 479 (U.S. Oct. 17, 2005).

106. Commonwealth v. Strong, 563 Pa. 455, 761 A.2d 1167 (Pa. Nov. 28, 2000) (Luzerne, PCRA appeal) (granting new trial under *Brady v. Maryland* where prosecutors withheld evidence relating to a deal with its star witness in exchange for his testimony against Strong; Pennsylvania Supreme Court holds that *Brady* evidence favorable to the accused "is not confined to evidence that reflects upon the culpability of the defendant [but] also includes evidence of an impeachment nature that is material to the case against the accused"; this "any implication, promise or understanding that the government would extend leniency in exchange for a witness' testimony").

- Commonwealth v. Moore, No. 22 of 1983, slip op. (Luzerne C.P. Sept. 22, 2000) (Luzerne, PCRA) (new sentencing hearing granted as a result of trial counsel's failure to act as an advocate during sentencing; defense counsel failed to interview *any* mitigation witnesses and failed to investigate or present any mitigating evidence; counsel's deficient closing argument included telling the sentencing jury that the defendant was from Philadelphia and rhetorically asking them "what more do you need to know?").[1]

®● Rompilla v. Horn, 2000 WL 964750, 2000 U.S. Dist. LEXIS 9620 (E.D. Pa. July 11, 2000) (Lehigh, habeas corpus) (new sentencing hearing granted for trial counsel's ineffectiveness in failing to investigate institutional records and provide to mental health experts school, medical, court and prison records that would have established petitioner's hospitalization at age two, assignment to special education, and mental retardation or borderline retardation, all of which would have been important to the diagnoses of

[1] This was the same lawyer whom the Pennsylvania Supreme Court had previously found to be ineffective in *Commonwealth v. Brian Smith*, 544 Pa. 219, 675 A.2d 1221 (1996), for failing to investigate mental health mitigation that was so obvious that the trial jury found "mental state" as a mitigating circumstance just by observing the defendant's demeanor at trial.

defense mental health experts; counsel also ineffective for failing to develop and present any mitigating evidence about Petitioner's abusive childhood, alcoholism, mental retardation, or possible organic brain damage), *rev'd*, 355 F.3d 233 (3d Cir. Jan. 13, 2004), *cert. granted*, 542 U.S. 966 (U.S. Sept. 28, 2004), *penalty-phase relief granted*, 545 U.S. 374 (U.S. June 20, 2005).

- Commonwealth v. Jones (James), Oct. Term, 1980, Nos. 2486, 2487, 2491 (Phila. C.P. June 21, 2000) (Philadelphia, PCRA) (*Jones I*, record-based claims) (death sentence vacated because it was based upon an aggravating circumstance that was neither charged nor argued to the jury; trial court had ruled that Commonwealth could not prove grave risk aggravating circumstance and so barred sentencing-phase evidence and argument on this aggravating circumstance; prior to deliberations, court instructed the jury that it could consider only the two aggravating circumstances for which the prosecution had presented evidence and argument, but provided jury with verdict slip that identified all statutory aggravating and mitigating circumstances; jury found grave risk aggravating circumstance in addition to the two aggravating circumstances for which evidence and argument had been presented; neither trial, post-verdict, or series of direct appeal counsel had ever looked at jury's verdict slip).

- Szuchon v. Lehman, No. 94-195-E (W.D. Pa. Apr. 12, 2000) (adopting magistrate's report) (Erie, habeas) (new sentencing hearing granted under *Mills v. Maryland* as interpreted by *Frey v. Fulcomer*; state court decision unreasonably applied *Mills*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *claim rev'd on grounds of procedural default, result aff'd on other grounds*, 273 F.3d 299 (3d Cir. Nov. 20, 2001) (jury resentenced to life).

- Commonwealth v. Wilson (Harold), July Term, 1988, Nos. 3267-3273 (Phila. C.P. Aug. 19, 1999), bench order (*Wilson I*) (Philadelphia, PCRA) (new sentencing hearing granted for sentencing-stage counsel's ineffectiveness in failing to investigate and present mitigating evidence) (new trial granted following remand of defendant's appeal from denial of guilt-stage relief, acquitted of all charges on retrial).

107. Commonwealth v. Edwards, Nos. 84 -- CR 529, 996 (Lack. C.P. June 16, 1999) (Lackawanna, PCRA) (stipulated plea to life accepted)

- Appel v. Horn, 1999 WL 323805, 1999 U.S. Dist. LEXIS 7530 (E.D. Pa. May 21, 1999) (Northampton, habeas corpus) (see description above), *aff'd*, 250 F.3d 203 (3d Cir. May 3, 2001) (resentenced to life).

108. Commonwealth v. Moran, Nov. Term, 1981, Nos. 3091 & 3092 (Phila. C.P. 1999) (Jan. 25, 1999) (Philadelphia, PCRA) (conviction overturned for counsel's ineffectiveness in

failing to communicate plea offer to defendant) (negotiated plea to life accepted, to be served in federal prison in witness protection program).

109. Christy v. Horn, 28 F. Supp. 2d 307 (W.D. Pa. Nov. 10, 1998) (Cambria, habeas corpus) (new trial granted for denial of right to independent mental health expert at trial; death sentence also overturned for numerous instances of counsel's ineffectiveness) (plea to life accepted)
* counsel ineffective at penalty phase of trial for failing to investigate and present evidence of the defendant's long history of mental illness, including paranoid schizophrenia that had been documented through four separate institutionalizations that had been successfully obtained by one of the prosecutors in the case and had been presided over by the trial judge; counsel was unaware of how to present mitigating evidence within institutional records he had at his disposal, and as a result, the evidence was ruled inadmissible;
* counsel also was ineffective for failing to object to the prosecutions arguments that Christy was the "Great Manipulator" and was feigning mental illness to obtain a life sentence, as well as to the prosecutor's improper argument that Christy would pose a future danger to society if he were not sentenced to death;
counsel was ineffective for presenting a character witness in the penalty phase whom he knew would testify on cross-examination that Christy had allegedly stated his intention to kill anyone who might witness a murder that he committed;
* counsel ineffective for prejudicially misinforming the sentencing jury during his penalty-phase closing argument that it had to unanimously agree to a sentence of life imprisonment before Christy could receive a life sentence.

- Jermyn v. Horn, 1998 WL 754567, 1998 U.S. Dist. LEXIS 16939 (M.D. Pa. Oct. 27, 1998) (Cumberland, habeas corpus) (death sentence reversed on multiple grounds including penalty-phase ineffectiveness of counsel, improper prosecutorial argument, and instructional error), *aff'd*, 266 F.3d 257 (3d Cir. Sept. 21, 2001) (capital reprosecution declined)
* Court found that trial counsel was ineffective in failing to investigate and present mitigating evidence relating to the extreme child abuse Petitioner suffered at the hands of his father, including being whipped with a cat o'nine tails, being suspended in the attic, and being leashed and made to eat out of a dog dish;
* The trial court also found that the prosecution's penalty-phase argument and the court's jury instructions violated the Eighth Amendment by improperly telling the jury that it should weigh the aggravating evidence in the case against each mitigating circumstance individually, rather than against the totality of the mitigating circumstances;
* The court also finds that jury instructions and the penalty-phase verdict slip are "on all fours" with *Frey v. Fulcomer* and grants relief under *Mills v. Maryland* because the instructions and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before it could consider and give mitigating effect to that circumstance.

110. Commonwealth v. Bryant (Robert), No. CC 8407686A (Allegheny C.P. Mar. 24, 1998) (PCRA) (death sentence reversed for ineffective assistance of counsel for failing to investigate and present mitigating evidence).

111. Frey v. Fulcomer, 132 F.3d 916 (3d Cir. Dec. 30, 1997) (Lancaster, habeas corpus appeal) (death sentence reversed under *Mills v. Maryland*; jury instruction and verdict slip created reasonable likelihood that jury believed it must unanimously agree to the existence of a mitigating circumstance before the jury was entitled to consider and give mitigating effect to that circumstance), *cert. denied*, 524 U.S. 911 (June 1, 1998) (plea to life accepted)

112. Smith (Clifford) v. Horn, 120 F.3d 400 (3d Cir. July 24, 1997), *cert. denied*, 522 U.S. 1109 (Feb. 23, 1998) (Bucks, habeas corpus appeal) (new trial granted as a result of defective specific intent instruction, which permitted jury to convict the defendant based upon the co-defendant's intent to kill and thereby relieved the prosecution of its burden of proving beyond a reasonable doubt that the defendant himself possessed the specific intent to kill) (bench retrial, resentenced to life).

113. Commonwealth v. Morales, 549 Pa. 400, 701 A.2d 516 (Pa. Sept. 17, 1997), *rearg. denied*, Nov. 13, 1997 (Philadelphia, successor PCRA) (death sentence reversed for ineffective assistance of penalty-phase counsel for failing to object to the prosecution's improper closing argument in which prosecutor argued that unless the jury sentenced the defendant to death, liberal judges would return him to streets; court holds that prosecutorial "reference to considerations outside the death penalty statute to argue for imposition of the death penalty" are improper; evidence of aggravating circumstances is "limited to those circumstances specified in [Pa. C.S. § 9711](d), . . . [which] contains no mention of defendants being released on parole"; "The prosecutor invited the jury to sentence this defendant to death in order to compensate for the alleged evils perpetrated by stereotypical liberal judges who routinely allow criminals to go free. The implicit argument is that if the jury does not take control of the case by imposing the death penalty, the liberal judges will intervene and somehow release the defendant. A second implicit argument is that imposing the death penalty in this case is a way to set the balance straight by compensating for the harm that has been done by the stereotypical liberal judges. Clearly such injustices, be they real or imagined, have nothing to do with this case, and the linking of a death sentence in this case with a perceived failing of the criminal justice system, dehors the record, was calculated to inflame the jury and might well have done so, thus constituting reversible error.") (jury unanimously resentenced to life; habeas pending on underlying conviction)

- Commonwealth v. Rolan, Feb. Term, 1984, Nos. 2893-2896, slip op. (Phila. C.P. March 5, 1997) (Philadelphia, PCRA) (death sentence reversed for ineffectiveness of counsel for failing to investigate and present mitigating evidence of organic brain damage) (jury unanimously resentenced to life; new trial granted in habeas proceedings)

114. Buehl v. Vaughn, 1996 WL 752959, 1996 U.S. Dist. LEXIS 19509 (E.D. Pa. Dec. 31, 1996), *aff'd*, 166 F.3d 163 (3d Cir. Jan. 20, 1999), *cert. dismissed*, 527 U.S. 1050 (U.S. June 25, 1999) (Montgomery, habeas corpus) (trial counsel ineffective for adopting an unreasonable trial strategy to focus only on the guilt-determining phase of the trial to the exclusion of any preparation for the penalty phase; counsel further ineffective for failing to investigate and present mitigating evidence in the penalty phase of trial) (plea to life entered on resentencing)
* counsel ineffective for asserting in his opening statement in the guilt phase of the trial that this case " is first degree murder or nothing" and that whoever committed the murders should be put to death;
* counsel ineffective for failing to object to the impaneling of a juror who stated she would "go by Moses law" and impose the death penalty if the defendant were found guilty "because it was written in the Bible . . . that when a person is wrong you have to stone to death";
* counsel ineffective for presenting a perfunctory argument for life in the penalty-phase closing that did not even address the small about of mitigating evidence that was before the jury;
* counsel rendered ineffective assistance in failing to investigate and present mitigating evidence; counsel unreasonably failed to obtain assistance of mental health expert – although counsel testified that he wanted to consult a psychiatrist, he did not do so because funds were not available from client's mother to pay one and the court denied funds because counsel was retained; the failure to retain a psychiatrist notwithstanding, counsel was ineffective in failing to investigate his client's background, including that he was a "longterm abuser of Methamphetamine" and had borderline personality disorder.

115. Travaglia v. Morgan, No. 90-1469 (W.D. Pa. Nov. 7, 1996) (Westmoreland, habeas corpus) (adopting magistrate's report) (resentencing hearing pending)

116. Commonwealth v. Terry, No. 1563-79, slip op. (Mtgy. C.P. Oct. 22, 1996) (*Terry II*) (Montgomery, PCRA) (death sentence reversed for ineffectiveness of counsel for failure to present family witnesses who testified to Mr. Terry's history of mental illness and bizarre behavior and for failing to present evidence that prison doctors had found Mr. Terry to be psychotic within days both before and after the offense) (jury resentencing; life sentence imposed by operation of law when jury failed to reach unanimous sentencing verdict).

○ Commonwealth v. Logan, Feb. Term, 1981, Nos. 966, 968 (Phila. C.P. August 18, 1996) (Philadelphia, stay proceedings) (court finds defendant mentally incompetent to be executed).

● Smith (Clifford) v. Horn, 1996 WL 172047, 1996 U.S. Dist. LEXIS 4573 (E.D. Pa. Feb. 22, 1996) (Bucks, habeas corpus) (death sentence reversed under *Caldwell v. Mississippi* where prosecutor inaccurately argued that if the jury returned a death sentence, unnamed

bureaucrats in Harrisburg could some day release the defendant on parole), 120 F.3d 400 (3d Cir. July 24, 1997) (granting new trial), *cert. denied*, 522 U.S. 1109 (Feb. 23, 1998) (resentenced to life).
* Court holds that "it is constitutionally impermissible for either a prosecutor or a court to mislead a jury about its responsibility for determining whether a person should be executed by giving it inaccurate information about its role in the process or about the role of an appellate court, the Governor, or a parole or pardons board";
* prosecutor improperly responded to defense counsel's argument that Smith "will be executed if death is your verdict," by stating "[n]o one knows for sure. We don't know if that eventually will occur. . . . Someday – and it won't be tomorrow, no matter what your decision is, and it will be years from now – but, someday conceivably people sitting in Harrisburg, who didn't sit here, could look at a bunch of papers and say 'We'll let him out; he's done enough time; it's time for parole.' That could happen too."
* "In sum, the jury was left with the critical misunderstanding that if it sentenced Smith to life he might be released on parole so as to pose a future danger to society. The prosecutor's summation, as noted, also left the jury with the inaccurate misconception that it did not have the ultimate responsibility for a death penalty decision because unidentified bureaucrats on the parole board might override any death penalty decision. Both were improper goads for a death sentence. Together, these statements undermined the jury's deliberative process and unconstitutionally tainted the jury's death sentence." The error was not harmless "[b]ecause this court cannot say that the prosecutor's comments 'had no effect on the sentencing decision.'"

117. Commonwealth v. DeHart, 539 Pa. 5, 650 A.2d 38 (Pa. Nov. 22, 1994) (Huntingdon, PCRA appeal) (Huntingdon, PCRA appeal) (death sentence overturned for counsel's ineffectiveness in failing to object to trial court's submission to the jury of penalty-phase verdict slip that incorrectly permitted jury to weigh sole aggravating circumstance against each mitigating circumstance individually, rather than cumulatively considering mitigating evidence; although Court did not specifically address appellate and PCRA counsel's ineffectiveness, relief granted under PCRA relaxed waiver rule after all prior counsel had technically waived the claim by failing to raise it at trial, on direct appeal, or in the trial court stages of the PCRA process) (unanimously resentenced to life).

118. Lesko v. Lehman, No. 86-1238, 1992 WL 717815 (W.D. Pa. Feb. 20, 1991) (Westmoreland, habeas), *on remand from grant of relief in* Lesko v. Lehman, 925 F.2d 1527 (3d Cir. Feb. 11, 1991) (resentenced to death).

- Lesko v. Lehman, 925 F.2d 1527 (3d Cir. Feb. 11, 1991) (death sentence reversed for cumulative prejudicial effect of prosecution's impermissible comment on his failure to express remorse, which violated his fifth amendment privilege against self-incrimination, and its inflammatory "appeal to vengeance" in sentencing), *reh'g & reh'g en banc denied*, March 11, 1991 (Westmoreland, habeas corpus appeal), *cert. denied*, 502 U.S. 898 (Oct. 7, 1991).

* Court notes that "[b]ecause of the surpassing importance of the jury's penalty determination, a prosecutor has a heightened duty to refrain from conduct designed to inflame the sentencing jury's passions and prejudices"
* Fifth Amendment privilege against self-incrimination (per *Griffin v. California*, 380 U.S. 609 (1965)) applies in penalty phase of capital trial and was violated by prosecutor's comments about his failure to express remorse
* a defendant does not waive his right against self-incrimination by testifying at the penalty-phase of trial where that testimony is limited to mitigating evidence "of a biographical nature," is "wholly collateral to the charges against him," and does not implicate the circumstances of the offense
* "the prosecutor exceeded the bounds of permissible advocacy by imploring the jury to make its death penalty determination in the cruel and malevolent manner shown by the defendants when they tortured and drowned" the victims
* the prosecution's appeal to vengeance was improperly "directed to passion and prejudice rather than to an understanding of the facts and of the law"
* the prosecutor improperly told the jury that it "had a 'duty' to even the 'score,' which stood at 'John Lesko and Michael Travaglia two, Society nothing'"
* the "even the score" comment improperly "invited the jury to impose the death sentence not only for [this case], but also for [a prior] murder . . . to which Lesko had already pled guilty, and for which he would be separately sentenced," in violation of the Double Jeopardy Clause of the Fifth Amendment; moreover, the jury not only had no "duty" to impose death for the prior murder, it "had no authority to impose the death penalty" for that prior offense
* while the comments on vengeance, considered in isolation, were not sufficiently prejudicial to require relief, the cumulative effect of those comments and the improper comment on silence were not harmless and required reversal of petitioner's death sentence.